Petition

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NO. 81-532

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EUGENE HOLT,
PETITIONER,

VS.

DONALD WYRICK, WARDEN,
MISSOURI STATE PENITENTIARY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

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EUGENE HOLT,

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VS.

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MISSOURI STATE PENITENTIARY,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER A STATE COURT CONVICTION OF MURDER BY A JURY HAND PICKED BY THE SHERIFF, THE CHIEF LAW ENFORCEMENT

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II

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III

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LIST OF PARTIES TO THE PROCEEDINGS

All the parties to the proceedings are contained in the caption of the case.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit below has not yet been reported. It is reproduced in the Appendix, Page 1.

The opinion of the District Court below was not reported, and it is reproduced in the Appendix, Page 50.

The opinion of the Missouri Supreme Court is reported at 592 S.W.2d 759, and is reproduced in the Appendix, Page 53.

JURISDICTION

The judgment of the Court of Appeals below was entered on May 14, 1981. Petitioner's Motion for Rehearing was denied July 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1 - The Confrontation Clause and Right to Counsel Clause of the Sixth Amendment which provides as follows: "In all criminal prosecutions, the accused shall enjoy the right * * *; to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defence."

2 - The Fourteenth Amendment which provides " * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *"

3 - The Statute under which Petitioner was prosecuted, Sect. 559.005, RSMO 1975 Supp., The Missouri Capital Murder Statute, as follows: "A person is guilty of Capital Murder if he unlawfully, willfully, knowingly, deliberately, and with premeditation kills or

causes the killing of a human being."

4 - The Statute under which the Petitioner was convicted, Sect. 559.020 RSMO 1978, which provides as follows: "All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide shall be deemed murder in the second degree."

5 - The Statute under which Petitioner sought post-conviction, 28 USC, Sect. 2254 providing that someone held in State custody may apply to the Federal Court for a Writ of Habeas Corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

PRELIMINARY STATEMENT OF THE CASE

This is a habeas corpus proceeding under 28 U.S.C 2254. Petitioner seeks relief from a sentence of life imprisonment upon conviction of second degree murder, which was affirmed by the Missouri Supreme Court.

Petitioner was charged under Sec. 559.005 Laws of Mo.1975 with the capital murder of his wife, " * * *by offering to pay one Roger Dale Jackson one thousand dollars ($1000.00) to kill Patricia Joye Holt and providing Roger Dale Jackson with a hand gun and the said Roger Dale Jackson at the direction of the defendant on November 23, 1976, * * *" did inflict a mortal wound." The jury found petitioner not guilty of capital murder, but did return a verdict of guilty of murder in the second degree and fixed his punishment at life imprisonment.

STATEMENT OF FACTS RELEVANT TO QUESTIONS PRESENTED FOR REVIEW

I

Because more than one-half of the regular jury panel had been excused for various reasons by the Circuit Judge, a special jury was selected by the Sheriff to try petitioner's case pursuant to order of the trial judge specifying that an additional twenty-five jurors be selected by the Sheriff.

Prior to personally selecting the twenty-five jurors, the Sheriff was not administered any type of oath prior to summonsing the jury in violation of Section 494.070, R.S.Mo. None of the twenty-five special jurors were from Portageville, the most populous community in New Madrid County.

The regular panel was chosen by lot from names selected from the voter registration list. The Circuit Judge

excused sixteen of the jurors on the regular panel from further jury service prior to the trial of this case. Of the forty-four jurors called to try this case, twenty were from the regular panel and twenty-four were special jurors hand picked by the sheriff and of the twelve jurors selected to try the case, six were from the regular panel and six were hand picked by the sheriff.

II

Petitioner was charged with capital murder under Section 559.005 (Laws of Mo. 1975), in that he hired the killing of his wife for $1,000.00. All of the state's evidence was that petitioner planned and deliberated over a period of several months for the murder of his wife. In fact, all of the state's evidence connected petitioner with the crime consisting of his engaging

another person to commit the murder and at the time of the killing, petitioner was in a nearby community of Neeleyville. The jury acquitted petitioner of capital murder and found him guilty of second degree murder. Under Missouri Law, the difference between capital murder and second degree murder is the element of cool deliberation.

The state's case was based on the credibility of Roger Dale Jackson who had an I.Q. of 59, mentally deficient with a basal mental age of 8 years. His testimony was the product of a plea bargain with the prosecutor in which the prosecutor reduced the charge against Jackson to second degree murder and a sentence of 25 years upon Jackson's

testimony in this case.

Jackson is a self-confessed liar, having made three different written statements concerning the identify of the persons responsible for the murder of Patricia Joye Holt.

III

Wanda Sue McAllister, the girlfriend of petitioner and cousin of the assassin Jackson, age 17, testified on behalf of the State at the preliminary hearing which, under Missouri Criminal Procedure, was for the sole purpose of determining whether there was probable cause to hold the petitioner for trial in the Circuit Court. At the trial of the case, the witness, McAllister claimed her Fifth Amendment Privilege and refused to

testify. After the preliminary hearing there were substantial new circumstances arising vitally affecting the credibility and reliability of McAllister's preliminary hearing testimony. The witness McAllister, after the preliminary hearing was intimidated by the prosecution, cooperated with the prosecution, at the direction of the state arranged for tape recordings of her conversations with petitioner and was so heavily biased in favor of the prosecution that she testified the prosecuting attorney was her personal attorney.

IV

After the petitioner was bound over for trial and while represented by counsel, the prosecutor and officers of the Highway Patrol entered into a plan to interrogate the petitioner

testimony in this case.

Jackson is a self-confessed liar, having made three different written statements concerning the identify of the persons responsible for the murder of Patricia Joye Holt.

III

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testify. After the preliminary hearing there were substantial new circumstances arising vitally affecting the credibility and reliability of McAllister's preliminary hearing testimony. The witness McAllister, after the preliminary hearing was intimidated by the prosecution, cooperated with the prosecution, at the direction of the state arranged for tape recordings of her conversations with petitioner and was so heavily biased in favor of the prosecution that she testified the prosecuting attorney was her personal attorney.

IV

After the petitioner was bound over for trial and while represented by counsel, the prosecutor and officers of the Highway Patrol entered into a plan to interrogate the petitioner

through tape recordings of telephone conversations with one Wanda McAllister concerning the circumstances of the alleged offense without the knowledge of the petitioner and in the absence of petitioner's counsel. The tapes were not offered into evidence by the prosecution, but the information obtained from the tape recordings were used by the prosecutor in cross-examining the petitioner during the trial.

V

A previous trial of the petitioner resulted in a hung jury. Petitioner was tried for this same offense before a jury on February 20, 1978, and essentially the same evidence was introduced at the former trial. The trial commenced at 9:00 A. M., and lasted until about 11:15 P. M., at night when the jury retired to consider

its verdict at 11:15. At 12:30 A. M., just one hour and twenty-five minutes after the jury commenced deliberation, they reported that they were, "hopelessly deadlocked", and the State trial judge declared a mistrial and discharged the jury, and thereafter, disqualified himself from the case because of lack of available dates to re-try the petitioner.

I

As in Duren v. Missouri, 439 US 357, 58 L Ed 2d 579, 99 S Ct 664, this case presents a due process challenge to Missouri's jury selection process in a criminal case. In Duren, this court struck down a system which caused undue representation of women on juries. In this case, a much more invidious Missouri practice has been passed constitional muster in the courts below, the hand selection of the jury which convicted petitioner by the sheriff, the chief law enforcement officer of the county.

Missouri had adopted a rather elaborate statutory system for the fair and random selection of jurors by a Board of Jury Commissioners (494.230 - 494.250 R.S.Mo.), which was ignored in this case.

The record in this case discloses that of the original 48 jurors summoned as required by law, the Sheriff failed to find 12 of the jurors and the regular Circuit Judge excused 16 others, a total of 28 jurors out of a chosen panel of 48. Those jurors excused by the regular judge were all done pursuant to an order for "good cause shown". The manner of excusing jurors has been the policy of the Circuit Court for the past fifteen years, and it is apparent from this record that jurors in New Madrid County were excused as a result of a longstanding practice of the Circuit Court without regard to whether there was a statutory justification.

The practical effect of this "policy" was to permit the Sheriff to select the jury in criminal cases. Under such a system it is rather understandable why

New Madrid County seldom acquits a defendant after trial by jury.

It is fundamentally unfair and denial of due process to allow the chief law enforcement officer to hand select jurors in a criminal case. No one would seriously contend that the Petitioner or his attorney should have the power to go out and hand pick jurors for the obvious reason that the panel would not be fair to the State. For exactly the same reason, the prosecution should not be granted this unfair advantage. Our system of justice is founded upon the principle of trial before a fair and impartial jury, and the selection of a jury by the chief law enforcement official of the county does not conform to the constitutional standards of fundamental principles of fairness required by the due process clause.

The Eighth Circuit had previously ruled in Henson vs. Wyrick, 634 F2d 1080 (8th Cir. 1980), cert. denied, 49 U.S. L.W. 3619 (U.S. Feb. 24, 1981), that Missouri's system which allowed the Sheriff to hand pick jurors violated due process, the Court stating;

> "The potential for a conviction prone jury under such a system is substantial. Although perhaps not directly involved in the investigation of Henson's crime, the sheriff was the immediate supervisor of the deputies in charge of the case. Regardless whether the sheriff had spoken with his deputies about the case or had formed an opinion as to Henson's guilt before the trial, there is a great potential for the sheriff to hand-pick jurors sympathetic to the prosecution. Where, as here, the jurors are picked according to the sheriff's subjective rather than objective criteria, the opportunity for the sheriff to express his allegiance to the prosecution by selecting sympathetic jurors is unlimited."

Although the same potential for a conviction prove jury exists in this case, the opinion below (App.8) attempts to distinguish Henson by stating:

"In this case, however, the facts differ significantly from those in Henson. First, the sheriff's office in neighboring Pemiscot County, rather than the New Madrid County sheriff's office, conducted the investigation. * * * Equally important, Holt presented no evidence that the sheriff selected only his acquaintances for the jury.

Although we express concern with the fundamental fairness in this method of selecting bystander jurors, the record in this case discloses no basis for inferring a deprivation of due process. Accordingly, we reject Holt's contention."

The above statement by the 8th Circuit misapplies the case of Duren in that the burden is upon the state to prove the absence of prejudice and the 8th Circuit's own order in Henson remanded the case to the District Court for an evidentiary hearing on how the jury was selected and placed the burden on the state. Although request for such a remand was made in this case, the 8th Circuit denied it. Furthermore, there is no evidentiary basis for the statement that the New Madrid Sheriff's Office did not make the investigation.

There was simply no evidence concerning the role of the New Madrid Sheriff's Office. Furthermore, there is no valid reason for distinguishing this case from Henson. The mere fact that the sheriff, the chief law enforcement officer handpicked a jury should be sufficient alone to demonstrate a violation of due process and right to fair trial whether or not he or his deputies personally investigated the crime. The possibility of conviction by a conviction prone jury is much greater in the case of sheriff's picking juries than in the case of a jury composed of under represented women which this court struck down in Duren.

When the totality of the circumstances is considered, we submit that the procedure employed in this case violated fundamental principles of fairness and denied the Petitioner due process. Allowing a Sheriff to hand pick jurors in a criminal case is a vestige of old criminal procedure which

should be struck down by this Court. At best, such a procedure gives the appearance of unfairness, and criminal trials should be free from any taint or suspicion that the jury has been "stacked" in favor of the State.

II

Under the Missouri statutory scheme in force at the time of the Petitioner's conviction, there were four distinct crimes of homicide, each defined by separate statutes. Section 559.005 defined capital murder; Section 559.007 defined first degree murder; Section 559.020 defined second degree murder; and Section 565.005 defined manslaughter. (Laws of Mo. 1975, repealed 1977, see now 565.001; 565.003; 565.004, and 565.005 V.A.M.S.). Under interpretations by the Missouri Supreme Court, State vs. Stapleton, 518 SW2d 292 and State vs. King. 577 SW2d 621, and its rules on use of Missouri Approved Criminal Instructions (MAI-CR 6.02), instructions must be submitted on lesser degrees of homicide. This

rule and what constitutes a lesser degree of homicide has caused considerable confusion among the lower Courts of Missouri. See, for example, State vs. King, supra, State vs. Handley, 585 SW2d 458 and State vs. Bradshaw, 593 SW2d 562.

Petitioner's conviction of second degree murder is completely without evidentiary basis, and is, therefore void and a denial of due process and violates Jackson vs. Virginia,443 US 307, 61 L Ed 2d 560, 99 S Ct 2781.

Petitioner does not contend that the Federal Court should overturn Missouri's interpretation of its statutes. Petitioner is claiming that a conviction of a violation of a Missouri criminal statute is constitutionally impermissible unless supported by substantial evidence, which convinces a rational trier of

fact beyond a reasonable doubt, Jackson. In this case, there is absolutely no rational basis on which a jury could have acquitted Petitioner of capital murder and convicted him of second degree murder. Under the circumstances of this case, second degree murder is not a lesser included offense of capital murder. The Petitioner was charged with a "contract murder", and the very first element in such a capital murder charge is the plan or design to commit the murder. Absent the "contract" there is no crime. If the State's theory and evidence are to be believed, for weeks, indeed months, the Petitioner discussed and planned the murder of his wife and promised Roger Jackson $1,000.00 in groceries if he would kill the Petitioner's wife and the Petitioner

took Jackson to his wife and left him to lie and wait for the return of his wife in order to murder her. The difference between capital murder and second degree murder is the deliberation. All of the State's evidence, if credible, tended to show the planning and deliberation and the arrangements made for the murder of Petitioner's wife. In fact, all of the State's evidence connecting Petitioner with the crime consists of his planning the murder and engaging Jackson to commit the murder. Yet, the jury has acquitted the Petitioner of this charge and found him guilty of second degree murder, not involving deliberation, planning and reflection by the Petitioner. There is simply no conceivable way

that the Petitioner is guilty of second degree murder. He either hired his wife's killer or he didn't. If the former, it is capital murder; if the later, he is innocent and certainly not guilty of second degree murder. There is no evidence that the jury could disbelieve which would render the Petitioner not guilty of capital murder and guilty of second degree murder. If he didn't deliberately plan the death of his wife, then he simply is not guilty. It is impossible to articulate a factual basis under the record in this case which would support the finding of not guilty of contract murder, but guilty of second degree murder.

The Missouri Supreme Court dismissed the whole issue by saying,

"If the jury decides to be more lenient under the circumstances, it does not mean it is being inconsistent or that its verdict is without factual basis." (App. 62). However, the Supreme Court does not tell us what that factual basis is, but does speculate as to why the jury did not convict Petitioner of capital murder - that is, Jackson, the murderer, was sentenced after pleading guilty to second degree murder; or that conviction of capital murder would have meant imprisonment without possibility of parole for 50 years (App. 60). Both of these speculations, if indulged in by the jury, are grossly improper. Attempting to justify a second degree conviction because of such speculations overlooks and misses the whole point. Such

reasoning simply makes the crime fit the punishment. The opinion below accepts this reasoning stating,

> "The Missouri Supreme Court rejected this claim. State v. Holt, supra, 592 S.W.2d at 764. The Court reasoned that the jury accepted the state's evidence, but decided to convict him of second degree murder as a matter of leniency." (App. 8)

What are these facts found by the jury constituting an unplanned, non-cool, non-deliberate arrangement for the murder of Patricia Joye Holt? The Opinions below and the Missouri Supreme Court are silent about these facts. If there is an evidentiary basis for second degree murder, Petitioner is entitled to have these facts set forth in the opinions below. The Courts below have simply refused to address the issue in violation of Jackson vs. Virginia, supra.

Furthermore, the State's case was based on the credibility of Roger Dale Jackson and this evidence is insufficient to convince any rational trier of fact of defendant's guilt beyond a reasonable doubt as required by Jackson, for the following reasons:

(a) He had an I.Q. of 59 and was mentally deficient with a basal mental age of only 8 years.

(b) His testimony was the product of a plea bargain with the prosecutor in which the prosecutor required the charge against Jackson to second degree murder and a sentence of 25 years upon Jackson's plea of guilty in return for Jackson's testimony in this case.

(c) Jackson is a self-confessed liar concerning the identity of the persons responsible for the death

of Patricia Joye Holt. By letter dated February 16, 1978, to the Prosecuting Attorney (Defendant's Exhibit B), Jackson claimed that Wanda McAllister killed Patricia Joye Holt. By letter dated October 3, 1977, (Defendant's Exhibit C), Jackson denied that he had killed Patricia Joye Holt and by letter dated December 14, 1977 (Defendant's Exhibit D), Jackson stated that his wife Margaret killed Patricia Joye Holt.

Jackson's testimony is tained, corrupt and impeached by every conceivable means recognized by law; lack of mental capacity, a plea bargain to testify against Holt, a conviction of felony, prior inconsistent statements on

three separate occasions and he was an accomplice, and he tells the incredible story that the defendant promised him $1,000.00 worth of groceries on the credit to kill his wife.

Surely, a sentence to life imprisonment must be based on a more rational and substantial footing than the incredible story told by a mental defective who has told three inconsistent stories concerning the identity of the persons responsible for the killing and after having told the different stories his testimony was purchased by the State in a plea bargain agreement to reduce the charge against him to second degree murder and a sentence of 25 years in the penitentiary.

III

The opinion below misapplied the two part test formulated by this Court in Ohio vs. Roberts, 65 L ed 2d 597, 100 S Ct 2531 (1980). The opinion below stated,

> "On the first prong of the test, the record shows that McAllister was unavailable because she invoked her fifth amendment privilege and refused to testify. See Phillips v. Wyrick, supra, 558 F. 2d at 494.
>
> On the second prong, we conclude that McAllister's preliminary hearing testimony possesses the same indicia of reliability as prior testimony which the Supreme Court has previously held admissible."

As to the first test, the opinion below is contrary to Douglas vs. Alabama, 380 US 415, 13 L ed 2d 934, 85 S Ct, 1974 (1965), which held that the Confrontation Clause forbids the substantive use at trial of a prior statement where the declarant is present at trial, but claims the privilege against self-incrimination. Here, the witness was present at the trial and therefore available, but refused to

testify, claiming her right against self-incrimination. There is always a risk that after a pre-trial statement a witness may at the trial change the statement, fail to remember the events, or claim a privilege not to testify. So far as the Confrontation Clause is concerned, there is no significant difference. In each case the witness is called to the stand to testify and is available as a witness. It is the testimony which does not conform to the pre-trial statement which is not available. The state has no legitimate interest in not having pre-trial testimony subject to these qualifications. Merely because the witness does not testify as expected does not make the witness unavailable for the purpose of the Confrontation Clause. This is simply a case where an available witness did not give the expected testimony, and therefore the Confrontation Clause was violated.

As to the second test, the preliminary hearing testimony does not possess indicia of reliability for the following reasons. The witness, McAllister had a strong motive to testify falsely at the preliminary hearing. The assassin directly implicated her at the murder and testified that only moments before the fatal shot the witness, McAllister called him on the telephone and instructed him to proceed with the murder. The assassin, a mental defective, testified that it was the telephone conversation which caused him to fire the fatal shots. It was only after the witness, McAllister had been granted immunity that she testified at the preliminary hearing and thus had a strong motive to exculpate herself from the murder scheme and to implicate petitioner. Furthermore, the preliminary hearing was not a full plenary hearing and cross-examination at such a hearing

is not sufficient to satisfy the Confrontation Clause. This court in Barber vs. Page, 390 US 719, 88 S Ct 1318, 20 L Ed 2d 255, stated,

> "Moreover, we would reach the same result on the facts of this case had Petitioner's counsel actually cross-examined Woods at the preliminary hearing. See Motes v. United States, 178 U S 458, 44 L ed 1150, 20 S Ct 993 (1900). The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching than a trial, simply because its function is the more limited one of determining whether probably cause exists to hold the accused for trial."

Also, there were substantial factual developments after the preliminary hearing which materially affected the witness, McAllister's credibility. After the preliminary hearing the witness, McAllister was coerced by the prosecution, cooperated with the prosecution, at the direction of

the state arranged for a tape recording of petitioner's conversation and was so heavily biased in favor of the prosecution that the witness testified the prosecuting attorney was her personal attorney. The opinion below dismisses these objections by stating, (App 19),

> "Holt also contends that he was deprived of the opportunity to cross-examine McAllister concerning events occurring after the preliminary hearing. We reject this argument because these later events do not concern the murder and had no effect on the reliability of the preliminary hearing testimony. In addition, Holt had an adequate opportunity to question McAllister about these events at a pre-trial suppression hearing."

The later events clearly affected the reliability of the preliminary testimony as it demonstrated her pro prosecution bias. Even if there was adequate opportunity to question her about these matters at the pre-trial suppression hearing, it could not be presented to

the jury without revealing the tape recording, which as discussed under IV violated petitioner's right to counsel.

IV

The Opinion below found that although there was unconstitutional interrogation of petitioner in violation of the Sixth Amendment, that the error was harmless beyond a reasonable doubt (App. 34). In so ruling, the Court did not follow the standards set forth in Chapman vs. California, 386 US 18, 17 L ed 2d 705. 87 S Ct 824. The opinion further stated (App. 34):

> "Under the circumstances of this case, we conclude that the information derived from the tape recordings, at most, slightly affected the outcome of the case. We thus hold that any error resulting from the state's alleged unconstitutional behavior is harmless beyond a reasonable doubt."

In ruling that the evidence, "at most, slightly affected the outcome of the case", the opinion clearly departed from the harmless error rule of Chapman. As this Court stated in Chapman,

> "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless."

Manifestly, this evidence was not harmless. The prosecution, through the use of illegally obtained evidence was allowed to cross-examine the petitioner in detail concerning his post-crime conduct and relationship with McAllister. This was especially devastating because Wanda Sue McAllister's preliminary hearing testimony was allowed to be heard by the jury and her testimony implicated

and connected petitioner with the plan to kill his wife. Under these circumstances, evidence of his continued relationship with her after she accused him of the crime was especially devastating. The prosecution was allowed to question him about his promises to leave with her to Argentina and finance her defense if she was prosecuted and that Petitioner would deny going out with her. The sole source of this information was from the illegally obtained tape recordings and it was highly prejudicial. It simply informed the jury that after the witness had identified petitioner as the mastermind in the plot to murder his wife, he was still having relations with her, promising her a defense and flight to

Argentina. One can hardly imagine more inflamatory evidence.

V

The Opinion below violates the Federal standard as announced in United States vs. Jorn, 400 U.S. 470, 27 L ed 2d 543,91 S Ct 547, in that double jeopardy prohibits re-trial if the trial judge abuses his discretion in declaring a mistrial. In determining whether the trial court had abused its discretion, the Supreme Court stated,

> "Yet, in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorable disposed to his fate."

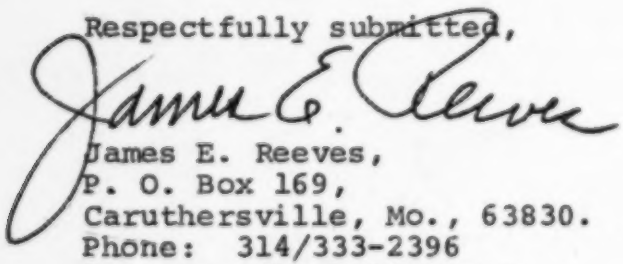
The Court concluded,

> "When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial."

The former trial consumed the whole day of February 20, 1978, and the jury did not commence to consider its verdict until 11:15 P. M. and at 12:35 A. M., the Court on its own motion declared a mistrial and discharged the jury (Tr. 17). Obviously, there was no "manifest necessity" to terminate the trial and the jury was not given an ample time to consider its verdict. It is common knowledge that in serious cases such as this one, juries frequently take days to reach a verdict. In this case, the defendant's

right to, "conclude his confrontation with society through the verdict of a tribunal he might believe to be favorable disposed to his fate" was terminated by the trial judge and double jeopardy bars this prosecution.

Respectfully submitted,



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Appendix

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-2004

EUGENE HOLT,

Appellant,

v.

DONALD WYRICK, WARDEN,
MISSOURI STATE PENITENTIARY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF MISSOURI

Submitted: March 12, 1981

Filed: May 14, 1981

Before BRIGHT and ROSS, Circuit Judges;
and HARRIS, Senior District Judge.*

BRIGHT, Circuit Judge.

*OREN HARRIS, United States Senior District Judge, Western District of Arkansas, sitting by designation.

Eugene Holt, a Missouri state prisoner, appeals from an order denying his petition for a writ of habeas under 28 U.S.C. § 2254. Holt's first trial for murder ended in a mistrial. In his second trial, the jury convicted Holt of second degree murder and sentenced him to life imprisonment. The Missouri Supreme Court affirmed Holt's conviction in an extensive opinion written by Judge Seiler. State v. Holt, 592 S.W.2d 759 (1980). Holt then filed a petition seeking habeas corpus relief in federal district court,[1] which referred the petition to Magistrate William S. Bahn. In a well-reasoned opinion, Magistrate Bahn recommended

[1]The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

dismissal of the petition on all grounds asserted by Holt, and Judge Hungate adopted the magistrate's recommendations in their entirety.

On appeal, Holt renews his assertions:

1) that the state denied him a fair trial because the jury consisted, in part, of bystander veniremen selected by the local sheriff;

2) that the jury had no evidentiary basis for convicting Holt of second degree murder, as a lesser included offense of capital murder;

3) that the evidence supporting his conviction, nothing more than "an incredible story told by a mental defective," was insufficient to convince any rational trier of fact of Holt's guilt beyond a reasonable doubt;

4) that the court deprived Holt of his right to confront and cross-examine witnesses against him by admitting the preliminary hearing testimony of the state's witness, Wanda Sue McAllister;

5) that the state invaded Holt's right to counsel by surreptitiously recording Holt's telephone conversations with witness McAllister prior to trial; and

6) that the state subjected Holt to double jeopardy by retrying him after the first trial judge, sua sponte, declared a mistrial when the jury reported a deadlock after a short period of deliberation. Having fully reviewed the record, we affirm.

I. Factual Background.

The Missouri Supreme Court ably set out the general factual background of the case.

Appellant, thirty-five years old, and his wife operated a small grocery store. Appellant became infatuated with a sixteen year old, Wanda Sue McAllister. Early in 1976, they became lovers. Appellant several times said he was going to kill his wife, mentioning drowning her, shooting her, rigging the bathtub so she would be electrocuted, and hiring someone to kill her. Roger Dale Jackson, age twenty, a cousin of Wanda, and not overly bright, testified that appellant offered to pay him $1000.00 to kill Mrs. Holt and also said he would forget about Jackson's unpaid bill at the grocery store.

The Saturday before the killing appellant took Jackson him with him, showed him the gun to use, and told him that the following Tuesday was the day. On Tuesday afternoon, Jackson met appellant at an agreed location behind a school house. Appellant again took Jackson to the house, gave him a handgun, told him where to wait and how his wife would enter the house, and instructed him to drag the body into the bathroom, douse the clothing and bathroom with lighter fluid, turn on the gas stove and leave. Appellant would attend a basketball game at Neeleyville, some fifty miles or so away, and return after it was all over.

Jackson waited for Mrs. Holt, shot her four times in the back, ran out the back door, went home and told his wife what he had done and hid the gun in the attic. Shortly thereafter Jackson pleaded guilty to second degree

murder on the understanding he would receive a twenty-five year sentence and would testify against appellant.

Appellant testified in his own behalf and admitted his infatuation and affair with Wanda McAllister, but denied having anything to do with killing his wife, with having hired Jackson to do so, or taking Jackson to the house. It was appellant's position that Jackson was a borderline mental defective, that he was engry with Mrs. Holt because she had refused him a sandwich and soft drink at the grocery store because of his unpaid bill and that his cousin, Wanda, was the one who persuaded him to shoot Mrs. Holt. (State v. Holt, supra, 592 S.W.2d 763.)

II. Jury Selection.

Although the murder occurred in Pemiscot County, Holt's trial took place in New Madrid County after a change of venue. Because the regular panel had been partially depleted, the trial judge ordered the New Madrid County Sheriff to select an additional twenty-five jurors. The venire from which Holt's jury was selected consisted of

twenty persons from the regular panel and twenty-five supplemental jurors selected by the sheriff.

Holt argues that the sheriff's selection of the supplemental jurors deprived him of a fair trial. Relying on Ross v. Wyrick, 581 F.2d 172 (8th Cir. 1978), and Henson v. Wyrick, 634 F.2d 1080 (8th Cir. 1980), cert. denied, 49 U.S.L.W. 3619 (U.S. Feb. 24, 1981), Holt argues that a sheriff's selection of jurors is inherently prejudicial because the sheriff's choices likely will mirrow the sheriff's bias toward the prosecution and produce a conviction-prone jury.

The Missouri Supreme Court and the federal magistrate properly distinguished Ross v. Wyrick as the court in Ross addressed the issue of racial

discrimination in jury selection. See State v. Holt, supra, 592 S.W.2d at 768.

This court's decision in Henson v. Wyrick, supra, likewise does not require reversal. In that case, the sheriff, whose subordinates investigated the crime and made the arrest, hand-picked the additional jurors from among his acquaintances. We granted habeas corpus relief because there existed the danger of a "conviction-prone" jury because of the "great potential for the sheriff to hand-pick jurors sympathetic to the prosecution." Id. at 1084.

In this case, however, the facts differ significantly from those in Henson. First, the sheriff's office in neighboring Pemiscot County, rather than the New Madrid County sheriff's office,

conducted the investigation. As the Missouri Supreme Court commented:

> Since the sheriff and his deputies were not involved in this case prior to trial, there was no question of the sheriff acting out of loyalty to deputies or on the basis of special knowledge of the facts of the case. (State v. Holt, supra, 592 S.W.2d at 768.)

Equally important, Holt presented no evidence that the sheriff selected only his acquaintances for the jury.

Although we express concern with the fundamental fairness in this method of selecting bystander jurors, the record in this case discloses no basis for inferring a deprivation of due process. Accordingly, we reject Holt's contention.

III. Second Degree Murder Conviction as Denial of Due Process.

The trial court instructed the jury on capital murder, second degree murder,

and manslaughter.[2] The jury found Holt guilty of second degree murder and sentenced him to life imprisonment. In his petition, Holt challenges the sufficiency of the evidence supporting his conviction on two grounds.

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[2] Both the capital and second degree murder charges required the jury to find:

1) that the defendant caused the death of his wife by offering to pay Jackson $1,000.00 to kill her and by providing Jackson with a handgun;
2) that the defendant intended to take Patricia Holt's life; and
3) that the defendant acted either alone or knowingly and with common purpose together with one or more in the commission of the unlawful acts.

The capital murder instruction contained two additional elements:

1) that the defendant knew that he was practically certain to cause the death of Patricia Holt; and
2) that the defendant considered taking the life of Patricia Holt and reflected upon this matter coolly and fully before doing so.

In order to find second degree murder the jury had to find the absence of provocation.

Holt first contends that his conviction for second degree murder violates due process because the jury could not rationally acquit him of capital murder,

yet convict him of second degree murder. Holt argues that the state, consistent with the requirements of capital murder, attempted to prove that he deliberately planned the murder of his wife by hiring Jackson to kill her and that the jury, by acquitting him of capital murder, rejected the heart of the prosecution's case.

The Missouri Supreme Court rejected this claim. State v. Holt, supra, 592 S.W. 2d at 764. The court reasoned that the jury accepted the state's evidence, but decided to convict him of second degree murder as a matter of leniency. The court concluded that "the jury had a right to convict on either the capital murder or second degree murder charge, provided there was evidence before the jury to support such a conviction." Id. This conclusion rests on the state court's interpretation of the Missouri murder

statutes. We are thus not faced with an issue cognizable in a federal habeas corpus petition, as long as the state introduced sufficient evidence to support the second degree murder conviction. See Jackson v. Virginia, 443 U.S. 307, 324 (1979); Davis v. Campbell, 608 F.2d 317, 319 (8th Cir. 1979).

Holt also contends that his conviction rested on insufficient evidence because no rational trier of fact could have believed the testimony of Roger Jackson. Holt characterizes Jackson as a "mentally defective" murderer whose testimony was "impeached by every conceivable means recognized by law."[3] The trial court

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[3] As impeachment evidence, Holt points to Jackson's IQ of 59, Jackson's plea-bargained testimony, and Jackson's admission that he gave three inconsistent versions of the murder, including a denial of participation in the murder.

found Jackson to be of sound mind and competent to testify. The state's medical expert disputed Holt's evidence and concluded that Jackson was not mentally retarded. As the magistrate seasoned, "even if we concede that Jackson was not the best witness," the other evidence of Holt's guilt was strong and convincing. In addition to Jackson's testimony that Holt offered him money and a gun to kill Mrs. Holt, the state presented corroborative evidence of Holt's participation in the crime. Wanda Sue McAllister and Margaret Jackson testified that Holt repeatedly expressed his intention to kill his wife. McAllister also confirmed Holt's specific plan to hire Jackson to kill Mrs. Holt. From our independent review of the record, we conclude that the Missouri Supreme Court correctly ruled that sufficient evidence

supported the conviction of second degree murder. Holt's conviction, therefore, does not violate due process.

IV. Wanda Sue McAllister Evidence.

The state promised Wanda Sue McAllister immunity from prosecution for Mrs. Holt's murder if she "would cooperate with the State." This short-lived cooperation produced two pieces of evidence: (1) McAllister's testimony at Holt's preliminary hearing; and (2) tape recordings of telephone conversations between Holt and McAllister. Holt asserts that the use of this evidence at his trial violated his rights under the sixth amendment as applied to the states through the fourteenth amendment. See Ohio v. Roberts, 100 S.Ct. 2531, 2537 (1980).

A. Preliminary Hearing Testimony.

Wanda Sue McAllister testified at Holt's preliminary hearing. At trial,

however, she exercised her fifth amendment privilege against self-incrimination and refused to testify. The trial judge ruled McAllister unavailable after she refused, during two in camera examinations, to answer questions about the murder. McAllister stated that she would persist in exercising her fifth amendment privilege to the point of going to jail for contempt. The trial judge then permitted the state to introduce into evidence McAllister's preliminary hearing testimony. Holt argues that the admission of this testimony at his trial violated his right to confront and cross-examine the witnesses against him.[4]

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[4]McAllister's preliminary hearing testimony disclosed:

(1) her meretricious relationship with Holt, including hotel locations, gifts, and wedding plans; (2) her knowledge of Holt's plans to drown, electrocute, or shoot his wife; (3) her knowledge of Holt's plans to hire Jackson to kill Holt's wife, including Holt's basketball alibi; and (4) Holt's attempt to induce her to change her trial testimony. The cross-examination of McAllister by Holt's counsel focused on: (1) her status as an unwed mother; (2) her

The confrontation clause guarantees the right to confront and cross-examine an accuser, face-to-face, at trial. Ohio v. Roberts, supra, 100 S.Ct. at 2537 & nn.5 & 6. Although the Supreme Court has acknowledged that "it is this literal right to 'confront' the witness at the time of the trial that forms the core of the values furthered by the Confrontation Clause," the Court has also recognized that confrontation clause values may be adequately protected under the rules governing the admission of hearsay evidence.[5] Id.

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failure to notify law enforcement officials of the murder plans; (3) her ambivalence towards Mrs. Holt's murder; (4) her impecuniousness; (5) her instructions to Jackson on how to carry out the murder; (6) her failure to talk Jackson out of the murder; and (7) her knowledge of Jackson's anger at Mrs. Holt for cutting off his credit at the store.

[5]The Court has not attempted to "map out a theory of the Confrontation Clause that would determine the validity of all * * * hearsay 'exceptions' * * *." California v.

at 2537 n.5, 2539 (quoting California v. Green, 399 U. S. 149, 157 (1970)).

In Ohio v. Roberts, supra, the Supreme Court formulated a two-part test for determining whether the confrontation clause bars the introduction of admissible hearsay in a criminal trial. "First, in conformance with the Framer's preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case * * *, the prosecution must * * * demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant." Id. at 2538.

Green, 399 U.S. 149, 162 (1970). Rather, the confrontation clause requires a case-by-case analysis to determine whether the application of an exception to the hearsay rule comports with the sixth amendment. United States v. Kelley, 526 F.2d 615, 620 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976). Compare Ohio vs. Roberts, supra, 100 S.Ct. at 2539 & n.8 (certain hearsay exceptions, such as dying declarations or prior trial testimony, rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection").

Once a witness is shown to be unavailable, the confrontation clause sanctions the use of prior testimony only if sufficient "indicia of reliability" or "requisite safeguards" existed at the time the testimony was given. Phillips v. Wyrick, 558 F.2d 489, 494 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978). See also Ohio v. Roberts, supra, 100 S.Ct. at 2539. The "indicia of reliability" assure that "the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement." California v. Green, supra, 399 U.S. at 161.

On the first prong of the test, the record shows that McAllister was unavailable because she invoked her fifth amendment privilege and refused to testify. See Phillips v. Wyrick, supra, 558 F.2d at 494.

On the second prong, we conclude that McAllister's preliminary hearing testimony possesses the same indicia of

reliability as prior testimony which the Supreme Court has previously held admissible. In Ohio v. Roberts, supra, the Court held that the "accountrements of the preliminary hearing itself" justified the introduction into evidence of the preliminary hearing testimony of a witness who is unavailable at the defendant's subsequent criminal trial. Id. at 2542. Accord, California v. Green, supra, 399 U.S. at 165. Holt presents no basis to distinguish his case from Roberts or Green.[6]

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[6] Holt also contends that he was deprived of the opportunity to cross-examine McAllister concerning events occurring after the preliminary hearing. We reject this argument because these later events do not concern the murder and had no effect on the reliability of the preliminary hearing testimony. In addition, Holt had an adequate opportunity to question McAllister about these events at a pretrial suppression hearing.

Accordingly, we hold that the trial court's admission of the preliminary hearing testimony did not deprive appellant of his right of confrontation.

B. Evidence Obtained from Tape Recordings.

After Holt's preliminary hearing, the prosecution, despite its knowledge that Holt was represented by counsel, contacted Wanda McAllister for the purpose of installing a wiretap on her telephone. Although McAllister "didn't want to make the recording," state officials told her "to make it or else." The prosecuting attorney told her that "he wanted enough on (the recording) to convict (Eugene)." Two highway patrolmen installed the wiretap, instructing McAllister not to call Holt, but to have him talk about the case when he called her.

After learning of the wiretap, Holt moved to suppress the tape recordings

on the ground that they were obtained in violation of his right to counsel as guaranteed by the sixth and fourteenth amendments. This motion was denied. The prosecution did not introduce this evidence in the state's case-in-chief. The prosecutor, however, apparently relied on information from the tapes in formulating his cross-examination of Holt.[7]

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[7] MR. HAZEL (Prosecutor): Q. Mr. Holt, on the evening of your wife's murder did you call Wanda McAllister and tell her "Tonight's the night."?

A. No, sir, I did not.

Q. Did you tell Wanda McAllister that you were going south after the trial?

MR. REEVES (Holt's attorney): To which we object, Your Honor, for the reasons previously stated.

THE WITNESS: No, sir, I did not.

THE COURT: Overruled.

MR. HAZEL: Q. Did you tell Wanda McAllister that you would never go to prison for murder?

MR. REEVES: Same objection, Your Honor.

THE COURT: Overruled.

Holt argues that the state, in procuring the tape recordings, "intentionally (created) a situation likely to induce (him) to make incriminating statements without the assistance of counsel(.)" United States v. Henry,

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THE WITNESS: I don't remember telling her that.

MR. HAZEL: Q. Did you tell Wanda McAllister that if you had anough money you would go off to Argentina with her?

MR. REEVES: To which we object, Your Honor, on the grounds previously stated.

THE COURT: Overruled.

THE WITNESS: I don't remember ever telling her we were gonna go to Argentina, no, I don't remember it.

MR. HAZEL: Q. Didn't you tell Wanda McAllister that if Roger Jackson testified about you showing him your house you would deny it?

MR. REEVES: To which we object, Your Honor, on the grounds previously stated.

447 U. S. 264, 274 (1980). See also Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964). Holt asserts that the state's conduct, in forcing Ms. McAllister to record her conversations with Holt, cannot be distinguished from that in Massiah where a coconspirator's surreptious recording of conversations with the defendant amounted to unconstitutional interrogation in violation of the sixth amendment. See Id. at 202-03.

Assuming that the prosecutor interfered with Holt's right to counsel, we deem the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). The state did not introduce the tapes into evidence. Much of the cross-examination in question

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THE COURT: Overruled.

THE WITNESS: I don't remember ever telling her that either.

related to Holt's relationship with McAllister, a relationship conceded to by the defense. Further, the prosecution presented substantial evidence of Holt's guilt in the state's case-in-chief.[8] As we stated in United States v. Weir, 575 F.2d 668 (8th Cir. 1978), "If, upon the record as a whole, this court is certain that the (use) of the evidence did not influence the jury, or had but a slight effect, the verdict should stand." Id. at 671. Under the circumstances of this case, we conclude that the information derived from the tape recordings, at most, slightly affected the outcome of the case. We thus hold that any error resulting from the state's alleged unconstitutional behavior is harmless beyond a reasonable doubt.

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[8] Because we deem any error harmless beyond a reasonable doubt, we need not reach the question whether the tapes seized in violation of the sixth amendment may be admissible for impeachment purposes. Compare United States v. Havens, 446 U.S. 620 (1980)

V. Double Jeopardy.

Appellant contends that the state unconstitutionally subjected him to double jeopardy by retrying him after his first trial ended in a mistrial. In Holt's first trial, the jury began its deliverations at 11:15 p.m. and returned to the courtroom at 12:35 a.m. At that time, the jury informed the court that "we have a hung jury." The trial judge then asked the foreman to indicate the jury's numerical division, "(w)ithout telling me how the vote is." In response, the foreman blundered by informing the court that nine jurors favored conviction.[9]

(evidence suppressed as fruit of unlawful search may be used to impeach a defendant's false trial testimony).

[9]The record reveals the following scenario:

THE COURT: Ladies and gentlemen of the Jury, the Bailiff tells me that you wish to come back into the Court Room. Mr. Schuerenberg, are you the Foreman of this Jury?

The trial judge then declared a mistrial after his poll of the jury confirmed the foreman's report of the deadlock.

MR. SCHUERENBERG: Yes, sir.

THE COURT: Are you back in here with a Verdict or back in here for some other reason?

MR. SCHUERENBERG: We have a hung Jury.

THE COURT: Without telling me how the vote is, give me the numerical division, if you will, please.

MR. SCHUERENBERG: Nine guilty --

THE COURT: No, don't tell me which way you stand, just tell me the numerical division, six and six or --

MR. SCHUERENBERG: Nine and three.

THE COURT: Nine and three?

MR. SCHUERENBERG: Yes, sir.

THE COURT: How long has your Jury been at nine and three?

MR. SCHUERENBERG: Oh, the last hour and a half.

THE COURT: Well, you have been out there an hour and thirty-five minutes. Have you been that way --

After a mistrial has been declared, sua sponte, by the first court, the state may retry a defendant if it can convince the reviewing court that the mistrial resulted from a "high degree" of necessity. Arizona v. Washington, 434 U.S. 497, 506 (1978); United States v. Perez, 22 U.S. (9 Wheat) 256 (1824) ("manifest necessity" test first enunciated).[10]

MR. SCHUERENBERG: We gained one in the last little bit. Gained one and lost one, whichever way you want to put it.

THE COURT: Do you feel like there is any possibility of reaching a verdict?

MR. SCHUERENBERG: No, sir, I sure don't. I don't think there is any chance.

(The polling of the jury followed this exchange.)

[10] If the defendant requests or consents to a mistrial, the manifest necessity test does not apply. Unless the underlying error is attributable to prosecutorial misconduct or judicial overreaching, the defendant's consent to a mistrial ordinarily removes any barrier to reprosecution. Lee v. United States, 432 U.S. 23 (1977); United States v. Dinitz, 424 U.S. 600, 611 (1976); United States v. Martin,

The inability of the jury to reach a verdict has long been considered the "classic basis for a proper mistrial." Arizona v. Washington, supra, 434 U.S. at 509. Indeed, the Supreme Court recently stated that a reviewing court should accord deference to a trial judge's decision to declare a mistrial when he considers the jury deadlocked. Id. at 510. To protect the defendant's "valued right to have his trial completed by a particular tribunal," United States v. Jorn, 400 U.S. 470, 484 (1971), however, "reviewing courts have an obligation to satisfy themselves that * * * the trial judge exercised 'sound discretion' in

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561 F.2d 135, 138-39 (8th Cir. 1977). The state argues that the defendant impliedly consented to a mistrial when his counsel failed to object to the sua sponte mistrial ruling of the first court. In light of our decision, we need not address the state's claim that his failure to object constituted a waiver of the former jeopardy plea.

declaring a mistrial." Arizona v. Washington, supra, 434 U.S. at 514.

Holt's first trial judge found himself in the unenviable position of balancing Holt's right to have his trial completed before the original jury against the strong policy of protecting the jury from judicial coercion. As the Missouri Supreme Court explained,

> (t)he appellant could, with justification, contend that sending the jury back at 12:45 or 1:00 o'clock in the morning, when the judge knew they were nine to three for conviction, was a tactic to give the state more leverage to convict the appellant. It would be different if the judge knew only that the jury stood nine to three, because then his attempt to bring about a verdict by requiring further deliberation would be made without the court's knowing which side would likely be the beneficiary of his action. Under the circumstances before him, the only way the court could avoid showing favoritism to the state was to declare a mistrial. His action was not over hasty or rash. (State v. Holt, supra, 592 S.W.2d at 772.)

Here then, the jury realized that the trial judge knew that the nine jurors stood for conviction. To send the jury back to

deliberate would inherently serve to coerce the minority to agree with the majority on conviction. Thus, we must conclude that the declaration of the mistrial resulted from "manifest necessity," and Holt's second trial does not offend the constitutional prohibition against double jeopardy. See Nelson v. District Court, 543 F.2d 631, 632 (8th Cir. 1976) (per curiam). See also Mullin v. United States, 356 F.2d 368, 370 (D.C. Cir. 1966) (Burger, J.) (mistrial resulting from jury's volunteering its division on guilt no bar to second trial, regardless of claimed deadlock).

Because we conclude that each of Holt's claims lacks merit, we affirm the district court's denial of habeas corpus relief.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EUGENE HOLT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 80-0454C(4)
	)	
DONALD WYRICK, Warden,	)	
	)	
Respondent.	)	
	)	
	)	

MAGISTRATE'S REVIEW AND RECOMMENDATION

Eugene Holt has presented an interesting application for habeas corpus pursuant to 28 U.S.C. § 2254. Holt was convicted of second degree murder in the Circuit Court of New Madrid County, New Madrid, Missouri, on February 15, 1979, as the result of a jury verdict. The conviction was affirmed by the Supreme Court on January 15, 1980, at 592 S.W.2d 759. Holt's original application was followed by his attorney's

brief, which was filed in this Court on July 29, 1980. Holt's counsel lists six grounds in support of his petition for federal habeas:

(1) Conviction of second degree murder on theory of lesser included defense of capital murder is absolutely without evidentiary basis and violates due process of law.

(2) Use of transcript of preliminary hearing denied petitioner of his right to confrontation and cross-examination in violation of the Sixth and Fourteenth Amendments.

(3) Conviction was obtained by a jury which was unconstitutionally selected by the sheriff, the chief law enforcement officer of the county.

(4) Conviction obtained by the use of unconstitutional tape recording in violation of the Sixth Amendment of right of counsel.

(5) Conviction obtained by violation of the protection against double jeopardy.

(6) The conviction was based on evidence which no rational trier of fact could believe beyond a reasonable doubt as required by Jackson v. Virginia,

,61 L.Ed. 2nd 560 (1979).

Respondent concedes exhaustion, so we proceed to consideration of the writ.

Petitioner's first ground in his application for the writ suggests that he is either guilty of capital murder or not guilty of any offense at all. This stand would require a finding that there was insufficient evidence to find him guilty of murder second degree. In homicide cases, Missouri courts have regularly instructed on all three types of homicide, capital murder or murder first, second degree murder and manslaughter. This was done in the Holt case and the defendant made no objection to the giving of all three instructions. As a matter of fact, in a paid assassin case, with rather substantial evidence, defence counsel would welcome the lesser

instructions.

Holt states now that there was no evidence to substantiate the giving of the murder second instruction. The Missouri Supreme Court, in its review of the case, stated that "not finding appellant guilty of capital murder does not foreclose a finding of the necessary intent for second degree murder, conviction of which would permit the jury more flexibility as to punishment". State v. Holt, supra, at p. 764.

The second degree murder instruction as given, required a finding that the defendant caused the death of his wife by offering to pay one Jackson $1,000 and providing Jackson with a handgun, and SECOND, that the defendant intended

to take the life of his wife, and THRID, that the defendant did not do so in anger, fear or aggitation, provoked by unexpected acts of his wife, and the defendant acted in conspiracy with one or more others. The transcript certainly supports a finding of guilty on this instruction. Federal courts do not reinterpret state statutes absent subterfuge; they are usually bound by the interpretation rendered by the wtate supreme court as to the application of its own statutes. Harkins v. Wyrick, 589 F2d. 387 (8th Cir. 1979).

It would be interesting to speculate as to Holt's position if he had objected to the giving of the lesser instruction. In that case, if the jury could not find that defendant knew he "was practically certain to cause the death" of his wife,

they could not satisfy the capital murder statute. However, Missouri case law disallows such a dilemma, since it requires murder submissions to also have murder second degree and manslaughter instructions. State v. King, 577 S.W.2d 621 (Mo. banc 1979).

We are unable to find any denial of due process in the Holt trial. Given the limited mentality of the assassin, Holt could not be "practically certain to cause the death of Patricia Joye Holt" as required in the murder first instruction. Wherefore, we conclude that there was ample evidence in the record from which a rational trier of fact could have found Holt guilty of murder second. Cooper v. Campbell, 597 F.2d 628 (8th Cir. 1979); Jackson v. Virginia, 443 U.S. 307

(1979).

Petitioner's second ground asking for federal habeas is that he was denied his constitutional right of confrontation and cross-examination of one Wanda McAllister, who refused to testify, taking the Fifth Amendment. The prosecution was then allowed to read a transcript of the preliminary hearing testimony given by McAllister. This is basically a state criminal evidence and procedure ruling, which does not suggest constitutional error absent a denial of due process. Maggitt v. Wyrick, 533 F.2d 383 (8th Cir. 1976). As petitioner suggests, the accused has a right to be confronted with witnesses against him. The use of a preliminary hearing transcript would not afford an

accused of the type of cross-examination normally used in a trial as opposed to that used in a preliminary hearing. Since the quantum of proof, namely probable cause required in a preliminary hearing, is much less than guilt beyond a reasonable doubt as required in a trial conviction, the cross-examination at a preliminary hearing could be much less extensive than that reached in a trial. However, in Barber v. Page, 390 U.S. 719 (1968), cited by both parties, the United States Supreme Court ruled, that where a witness is truly unavailable, prior testimony may be used. The State of Missouri has held in State v. Phillips, 511 S.W.2d 841 (Mo. 1974), that a witness is unavailable by reason of asserting his privilege against self-

incrimination. Therefore, we conclude that once McAllister asserted her rights of self-incrimination, she became truly unavailable and the preliminary hearing transcript was available to the prosecution.

In his third ground seeking habeas corpus, petitioner challenges the jury selection method used in his trial. The petitioner challenged the special jury panel at the time of trial, alleging that it was not ordered and summoned as required by law and that there was no legal basis to select additional jurors. This case was tried in a different county from that wherein the crime was committed, on a change of venue. That would mean that the sheriff in the trial county would not have worked on the case in question.

Petitioner cites Ross v. Wyrick, 581 F.2d 172 (8th Cir. 1978), which upset a conviction in Mississippi County, Missouri, because the sheriff handpicked some black jurors to supplement the Ross panel. Ross addressed the issue of the addition of exclusion of an identifiable segment of the community, namely the blacks. This obviously disallowed a fair and impartial jury.

Although Holt challenged the supplemental panel in question, he does not point out wherein this new panel prejudiced him. He was allowed routine voir dire and the court afforded him sixteen preemptory challenges, four more than required by statute. As we have stated before, Missouri's supplemental jury selection leaves much to be desired, but it

is not inherently unconstitutional. Furthe , petitioner has failed to set out any particular juror or jurors which were basically unconstitutionally selected by the sheriff in question.

Petitioner charges that prosecution intruded upon Holt's constitutional right not to be examined after known representation by counsel. This is a Sixth Amendment right. Petitioner charges that the prosecution illegally obtained a tape recording of telephone conversations between himself and McAllister. This was done after Holt had been charges and after McAllister had testified against him at a preliminary hearing. The tape in question was not introduced into evidence at the trial.

Petitioner cites Massiah v. United States, 377 U.S. 201 (1964), wherein federal agents deliberately illicited in criminating statements from the defendant after he had been indicted and in the absence of his counsel. The calls in question here were instituted by Holt to McAllister. There is no question but that the prosecution arranged for the taping of the calls. However, it is not clear how these conversations could be viewed as interrogations.

Petitioner has filed a supplemental brief, citing the case of United States v. Henry, 65 L.Ed. 2d 115, decided on June 16, 1980. There, government agents used an inmate in the cell block with the defendant, to obtain information from Henry. He was under charge and had

counsel.

The inmate informer used in Henry was a paid government informant, who was told not to question or to initiate conversations with Henry regarding the pending bank robbery charges, but to "pay attention to the information furnished by Henry". The Supreme Court found that the government created a situation likely to induce Henry to make incriminating statements without the assistance of counsel, and thereby violated his Sixth Amendment right to counsel. It found this planned scheme to be an impermissible interference with the right to the assistance of counsel. In Holt, we have a murder suspect talking with his paramour under the misplaced trust that his lover would not reveal

his wrongdoings to the state. At any rate, the tape obtained was not used in the trial and could hardly be called prejudicial. The mere charge of a crime does not herald the cessation of the investigation of same by the state. Law enforcement people are free to pursue legitimate means of obtaining additional evidence to fortify their case. The mere action of authorized wiretap does not earn federal habeas. Also, as previously indicated, petitioner has failed to show prejudice.*

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*The Supreme Court recently granted certiorari on the case of United States v. Morrison, 602F.2d 529 (3rd Cir. 1979), which upheld the dismissal of an indictment by a district trial judge. He had found impermissable intrusion of the defendant's right to counsel when the government, ex parte, had advised the defendant of the low caliber of her attorney the severity of the trial judge and the fact that she was going to prison. No prejudice was shown which resulted in a split decision.

Petitioner cites double jeopardy as the fifth basis for his solicitation of habeas corpus. In United States v. Jorn, 400 U.S. 470 (1971), it was held that if a trial judge abuses his descretion in declaring a mistrial, double jeopardy prohibits retrial. Holt had been tried in 1978 in a different county. The jury commenced its deliberation at 11:15 p.m. and at 12:35 a.m., reported that it was hung. The foreman blundered to the judge that it was "nine guilty" and that there was no hope of reaching verdict. The court interrogated the jurors one at a cime and all replied that there was no change of a verdict. Whereupon, the court declared a mistrial and reset the case. The petitioner states that this action was too hasty and there was no"manifest necessity" to terminate the trial, although

he made no objection at the time.

From a practical standpoint, defense counsel in a criminal case would not want to lengthen the deliberation of a jury, nine of whose number had already found guilt. Had the foreman blurted out the fact that the jury stood nine for acquittal, most assuredly, defense counsel would want to continue deliberation. Under the circumstances, we find no abuse of the Jorn standards.

Petitioner's sixth contention is that his conviction violates the due process clause because it was based upon evidence which no rational trier of fact could believe beyond a reasonable doubt. The principle witness against Holt was one Roger Jackson, who had previously pleaded guilty to the murder and received a twenty-

five year sentence. Evidence was introduced to show Jackson of subnormal mentality and the fact that he had previously been at least careless with the truth. The trial court observed and questioned Jackson and found him to be of sound mind. The jury, knowing of the plea bargaining which allowed him a twenty-five year sentence, his borderline mentality and his previous incredibility, chose to believe him. Indeed, there were other facts and witnesses which fortified these findings.

Petitioner would be entitled to habeas corpus relief on the basis of insufficient evidence only if his conviction is totally devoid of evidentiary support. Wilson v. Parratt, 540 F2d 415, 416 (8th Cir. 1976). Petitioner cites Jackson v.

Virginia, supra, which decided that due process requires that a conviction must be based on sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. Even if we concede that Jackson was not the best witness, there was the testimony of McAllister, Margaret Jackson, the county sheriff and evidence found at the murder scene. This was not a borderline case, the evidence was strong and convincing and the Jackson standards are satisfied.

Petitioner's plea for federal habeas corpus is supported by able counsel and well reasoned briefs. This combination tests the state's case at every level. However, the reviewing Magistrate is unable to find any breach of Holt's constitutional rights. Murder by hire is

ugly at every viewable angle. Petitioner's counsel saw to it that he had a fair trial, not once but twice. The latter trial comported with all federal standards and does not yield to a plea for federal habeas. All matters in controversy have been carefully and capable placed before this Court; there is no need for an evidentiary hearing.

Therefore, it is the recommendation of the reviewing Magistrate that Eugene Holt's application for federal habeas corpus be denied without further proceedings.

The parties are hereby advised that they have ten days from the service of this recommendation within which to file objections to same, pursuant to 28 U.S.C §636 (b).

s/
United States Magistrate

Dated: August 15, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

EUGENE HOLT,	)	
	)	
Petitioner,	)	
	)	
v.	)	No.80-0454C(4)
	)	
DONALD WYRICK, Warden	)	
	)	
Respondent.	)	
	)	

ORDER

This matter is before the Court on the petition of Eugene Holt for a writ of habeas corpus.

Pursuant to 28 U.S.C. §636 (b), the petition was regerred to the United States Magistrate for his review and recommendation. After fully reviewing the record, the United States Magistrate filed his recommendations.

Petitioner has raised six objections incorporating arguments presented in the initial petition and adequately addressed

in the Magistrate's recommendations. For example, the Magistrate's recommendation concerning the propriety of the use of a transcript of preliminary hearing testimoney at trial is corroborated by Phillips v. Wyrick, 558 F.2d 489, 494 (8th Cir. 1977), cert. denied, 434 U.S. 1088 (1978).

Having fully considered the Review and Recommendation of the United States Magistrate and the exceptions filed thereto,

IT IS HEREBY ORDERED that the Review and Recommendation of the United States Magistrate be and the same is adopted and that the petition of Eugene Holt be and the same is denied without further proceedings.

Dated this 9th day of September, 1980.

s/_____
William L. Hungate
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-2004 September Term, 1980

Eugene Holt, Appellant,	)
	) Appeal from the
	) United States
vs.	) District Court for
	) the Eastern District
Donald Wyrick, Warden, Missouri State Penitentiary, Appellee.	) of Missour.

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

July 1, 1981

STATE of Missouri, Respondent,

v.

Eugene HOLT, Appellant.

No. 61260.

Supreme Court of Missouri,

En Banc.

Jan. 15, 1980.

Rehearing Denied Feb. 11, 1980.

SEILER, Judge.

Patricia Joye Holt was found murdered in her home in Bragg City, Missouri on November 23, 1976. In force on that date were §§ 559.005, RSMo 1975 Supp., defining the crime of capital murder[1] and § 559.020, RSMo 1969, defining second degree murder. Defendant, husband of the victim, was charged by amended information that he "did then and there willfully, unlawfully, knowingly, deliberately, feloniously, premeditatedly, and of his malice aforethought kill one Patricia Joye Holt by offering to pay one Roger Dale Jackson One Thousand

Dollars ($1000.00) to kill Patricia Joye Holt and by providing Roger Dale Jackson with a handgun and the said Roger Dale Jackson at the direction of defendant on the 23rd day of November, 1976 . . . did after accepting defendant's offer, make an assault upon the said Patricia Joye Holt with a loaded handgun inflicting a mortal wound from which she died . . ."

Defendant, tried before a jury, was convicted of second degree murder, sentenced to life imprisonment and appeals. Since a life sentence was imposed, we have jurisdiction, Mo.Const. art. V, § 3, as amended August 3, 1976, effective January 2, 1979.

1. The death penalty provisions for this crime were held unconstitutional in State v. Duren, 547 SW.2d 476 (Mo. banc 1977), before appellant was tried. In the same decision, the alternative punishment directed by the legislature in the event that the death penalty were held unconstitutional life imprisonment without eligibility for probation or parole for fifty years-was upheld.

Defendant on appeal (hereinafter "appellant"), raises a number of points, the disposition of which requires first a statement of the facts, taken from the standpoint of those supporting the verdict.

So viewed, there was evidence of the following before the jury: appellant, thirty-five years old, and his wife operated a small grocery store. Appellant became infatuated with a sixteen year-old, Wanda Sue McAllister. Early in 1976, they became lovers. Appellant several times said he was going to kill his wife, mentioning drowning her, shooting her, rigging the bathtub so she would be electrocuted, and hiring someone to kill her. Roger Dale Jackson, age twenty, a cousin of Wanda, and not overly bright, testified that appellant offered to pay him $1000 to kill Mrs. Holt and also said he would forget about Jackson's unpaid bill at the grocery store.

The Saturday before the killing appellant took Jackson home with him, showed him the gun to use, and told him that the following Tuesday was the day. On Tuesday afternoon, Jackson met appellant at an agreed location behind a school house. Appellantagain took Jackson to the house, gave him a handgun, told him where to wait and how his wife would enter the house, and instructed him to drag the body into the bathroom, douse the clothing and bathroom with lighter fluid, turn on the gas stove and leave. Appellant would attend a basketball game at Neeleyville, some fifty miles or so away, and return after it was all over.

Jackson waited for Mrs. Holt, shot her four times in the back, ran out the back door, went home and told his wife what he had done and hid the gun in the attic. Shortly thereafter Jackson pleaded guilty

to second degree murder on the understanding he would receive a twenty-five year sentence and would testify against appellant.

Appellant testified in his own behalf and admitted his infatuation and affair with Wanda McAllister, but denied having anything to do with killing his wife, with having hired Jackson to do so, or taking Jackson to the house. It was appellant's position that Jackson was a border-line mental defective, that he was angry with Mrs. Holt because she had refused him a sandwich and soft drink at the grocery store because of his unpaid bill and that his cousin, Wanda, was the one who persuaded him to shoot Mrs. Holt.

I

(1) Appellant's first point is that the court erred in overruling his motion for

judgment of acquittal because the conviction of second degree murder is without evidence to support it; that appellant was charged with a "contract murder" in violation of the capital murder statute; that the finding of guilty as to second degree murder constitutes an acquittal of capital murder and there is no rationale or factual basis under the facts whereby appellant could not have been guilty of capital murder, but guilty of second degree murder.

The jury was given three choices by the instructions: guilty of first degree murder,[2] guilty of second degree murder,

2. It is unexplained and no point is made of why the instruction referred to first degree murder rather than capital murder. The instruction, No. 5, is marked as MAI-CR 6.06 being its source. MAI-CR 6.06 is the approved instruction for second degree murder, so there was some kind of mixup as to the MAI-CR reference. Instruction No. 5 as given, however, actually corresponded to MAI-CR 6.02, which is the required capital murder instruction.

and not guilty. Appellant argues that if he hired his wife's killer he is guilty of capital murder; that if he did not, he is innocent; that the jury has, in effect, acquitted him of capital murder and hence found he did not arrange the death of his wife and so he cannot be guilty of second degree, either.

It does not follow that by not finding defendant guilty of capital murder the jury did not believe that he arranged the shooting of his wife. The jury could have believed he did, indeed did so believe as shown by instruction No. 6, which set forth what was required to be found to convict of second degree, yet decided it would convict him of second degree, not capital, murder. We could speculate that this was because the jury was aware the person who did the shooting, Roger Dale Jackson, pleaded guilty

to second degree murder and received a sentence of twenty-five years, and was also aware that on conviction of capital murder (or first degree murder as the instruction put it), the only sentence available would have been life imprisonment without possibility of parole for fifty years. Whatever the reason, the jury had a right to convict on either the capital murder or second degree murder charge, provided there was evidence before the jury to support such a conviction.

This case does not present the problem we addressed in State v. Handley, 585 S.W. 2d 458 (Mo. banc 1979). In Handley the two crimes covered by the two principal instructions were different as to intent-in the felony murder instruction, no intent to commit an assault was required, whereas in the second degree murder instruction (on which the jury convicted) there had to be

an intent to assault the particular guard who was killed. Therefore, in Handley were not guilty of aiding or abetting in the bank robbery (which was the only basis on which he could have been acquitted of that crime under the facts), then he could not be involved in aiding and abetting the assault, because his only connection with the entire affair had to be based on his aiding and abetting the bank robbery (as to which the jury found otherwise).

But in the case at bar, an intent to aid and abet in an assault on the victim was required in both the instruction on capital murder and on second degree murder, although there was a difference as to the intensity or extent of intent between the two. Hence, not finding appellant guilty of capital murder does not foreclose a finding of the necessary intent for second degree murder, conviction of which would permit the jury

more flexibility as to punishment. If the jury decides to be lenient under these circumstances, it does not mean it is being inconsistent or that its verdict is without factual basis.

(2) As to whether there was evidence to support a finding of guilt under the instruction submitting second degree murder in the case at bar, the instruction, which was MAI-CR 6.06, required the following:

"If you do not find the defendant guilty of murder in the first degree, you must consider whether he is guilty of murder in the second degree.

"As to murder in the second degree, if you find and believe from the evidence beyond a reasonable doubt:

"First that on the 23rd day of November 1976, in the County of Pemiscot and State of Missouri, the defendant caused the death of Patricia Joye Holt by offering to pay one

Roger Dale Jackson One Thousand Dollars ($1000.00) to kill Patricia Joye Holt and by providing Roger Dale Jackson with a handgun, and

"Second, that the defendant intended to take the life of Patricia Joye Holt, and

"Third, that the defendant did not do so in anger, fear or agitation suddenly provoked by the unexpected acts or conduct of Patricia Joye Holt, and

"Fourth, that the defendant acted either alone or knowingly and with common purpose together with one or more others in the conduct referred to in the above paragraphs, then you will find the defendant guilty of murder in the second degree."

There was ample evidence to support each required finding. Jackson testified appellant offered him money to kill Mrs. Holt and provided him with a gun to do so. Jack-

son, his wife and McAllister each testified to expressions by appellant over a period of time that he intended to kill his wife. McAllister testified appellant told her how Jackson was to do it. It is evident that appellant did none of the foregoing in anger, fear or agitation suddenly provoked by the unexpected acts or conduct of his wife; appellant was not even present. And finally, there was ample evidence that appellant acted knowingly and with common purpose with Jackson in the conduct referred to in the earlier paragraphs of the instruction.

So it is not correct that there was no evidence to support a finding of guilt of second degree murder and the contention to the contrary is overruled.

II

(3) Appellant's second point is that he is

entitled to a judgment of acquittal on the ground that the evidence showed that Wanda Sue McAllister caused the fatal shot to be fired and that there is no evidence that he caused the death of his wife. Jackson testified that after appellant left the house, Jackson called McAllister on appellant's telephone while he waited for Mrs. Holt to get home. Jackson also testified that McAllister urged him not to miss and that he would not have killed Mrs. Holt had it not been for this urging by McAllister just minutes before Mrs. Holt arrived home.

There was sufficient evidence for the jury to find that appellant caused the death of Mrs. Holt. He hired Jackson to kill her, let Jackson into the house, gave Jackson the gun, and instructed Jackson on how he wanted

the murder accomplished. Appellant had also convinced McAllister to go along with this plan after she first objected to involving Jackson, her cousin, in the plan. It was foreseeable that McAllister would urge Jackson to do as appellant instructed him to do.

There is a clear causal relation between appellant's conduct (providing Jackson with the incentive, plan and means for killing Mrs. Holt), and the criminal result (the death of Mrs. Holt). Appellant's conduct was the cause which, operating in a natural and continuous sequence, produced the intended illicit result. McAllister's support for the plan, which appellant had solicited, was not an independent or unforeseeable intervening cause of Mrs. Holt's death which would relieve appellant of lia-

bility for the result of his criminal acts, but rather was a foreseeable result of appellant's efforts to achieve the intended murder. Under these circumstances, the evidence established criminal causation. See State v. Glover, 330 Mo. 709, 50 S.W. 2d 1049 (1932); M. Bassiouni, Substantive Criminal Law at 191-92 (1978).

III

Appellant alleges two grounds of error in the admission of the transcrip of Wanda McAllister's testimony at the preliminary hearing after McAllister, at the trial, exercised her fifth amendment privilege against self-incrimination and refused to testify. First, appellant contends that the admission of the transcript denied him the right to confront and cross-examine McAllister in violation of the sixth and fourteenth a-

mandments as enunciated in Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). Second, appellant contends that because the transcript was not certified by the magistrate and signed by the witness in accordance with Rule 23.11 and Rule 23.12, its admission constituted reversible error. Neither contention presents grounds of reversible error.

A

(4,5) The sixth amendment guarantee that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." is applicable to all criminal proceedings in state courts under the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). An exception to the confrontation requirements

exists where a witness is unavailable and has given testimony which was subject to cross-examination at previous judicial proceedings against the same defendant. Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255; State v. Murphy, 592 S.W.2d 727 (Mo. banc 1979). "This exception has been explained as arising from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." Barber v. Page, 390 U.S. at 722, 88 S.Ct. at 1320.

(6) In State v. Phillips, 511 SW.2d 841, 847 (Mo1974), we held that for the purpose of admitting into evidence prior testimony under this limited exception to the confrontation requirement, a witness is "unavailable"

by reason of asserting his privilege against self-incrimination. Accordingly, in the case at bar, Wanda McAllister was unavailable as a witness once she asserted her privilege against self-incrimination. Appellant's able counsel cross-examined this witness at the preliminary hearing and appellant thus was afforded substantial compliance with the purposes behind the confrontation requirement. It was not error under the confrontation requirement, therefore, for the trial court to admit into evidence McAllister's previous testimony from the preliminary hearing.

B

(7) The transcript of McAllister's testimony was not certified by the magistrate and signed by McAllister in accordance with Rule 23.11 and Rule 23.12.[3] Appellant

asserts that under State v. Luttrell, 366 S.W.2d 453 (Mo.1963), the admission of the preliminary hearing transcript without compliance with these rules constituted prejudicial and reversible error. In the Luttrell case, as here, the transcript was neither certified or signed. In Luttrell, however, unlike the circumstances in the instant case, the defendant objected to the introduction of the transcript into evidence on the ground that it was not a true and correct transcript. The disputed

3. Rule 23.11 provides in part: "Upon the completion of preliminary examination, if the defendant be bound over to answer a felony charge, all papers in connection with the hearing shall be certified by the magistrate or the clerk of the court in which the offense is cognizable, within ten days. Rule 23.12 provides: "In all cases of homicide, the evidence given by the witnesses (at the preliminary hearing) shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

testimony in Luttrell, which the defendant had asserted was inaccurately recorded, directly contradicted his testimony. Moreover, in Luttrell the Court specifically found that the admission of the disputed transcript was prejudicial to the defendant.

In the case before us, appellant has not challenged the transcript on the ground that it is not a true and correct transcript of the testimony at the preliminary hearing and there is no dispute as to whether McAllister made the statements. The official court reporter who transcribed the testimony at the preliminary hearing identified the transcript and attested to its truth and accuracy. In State v. Banton, 342 Mo. 45, 111 S.W.2d 516, 518 (1937), this court held that the purposes of the certification and signature requirements were to secure a fair preliminary examination

and to preserve the testimony taken. In this case there is no challenge to the fairness of the preliminary hearing nor is there a charge that any of the testimony taken was not preserved. Appellant does not show noncompliance with the rules resulted in any prejudice.

In State v. Phillips, supra, this court permitted oral testimony of a person who heard and remembered the previous testimony of a witness unavailable to testify in the second proceeding. In the case at bar, the transcript of McAllister's testimony, which appellant does not challenge on the basis that it is not a true and correct account of McAllister's testimony, presents more reliable evidence than the oral testimony permitted in Phillips. Except for the certification and signature requirements

under Rules 23.11 and 23.12
of the transcript in lieu o
the unavailable McAllister
proper and no prejudice has
by appellant to have result
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error.

IV

Appellant alleges seve
error in the trial court's
motion to quash the jury pa
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panel. The circuit clerk t
hearing that the regular pa

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tember term of court was chosen thirty days prior to the new term. Twenty-four regular and twenty-four alternate jurors were called. Twelve jurors could not be found and, of the remaining thirty-six called, sixteen jurors were excused for good cause. The trial judge then ordered the sheriff to select a specail jury of twenty-five additional jurors. The record does not indicate whether the sheriff was given an oath prior to the summoning of the special jury. The court overruled appellant's motion to quash the specail jury panel but afforded defense counsel sixteen peremptory challenges in the jury selection, four more than directed by §546.180, RSMo 1978, with thirty-seven jurors remaining after seven jurors had been stricken for cause. The state was afforded eight peremptory challenges.

A

(8-10) Appellant contends that because the circuit judge excused from the regular panel sixteen jurors "for good cause shown", the sheriff's selection of jurors substituted in large part for the statutory mandate of random selection of jurors. Appellant alleges that the circuit judge improperly excused some jurors who did not meet the statutory justifications for excuse in §§ 494.031 RSMo 1978. At the hearing on appellant's motion to quash the special jury panel, the circuit clerk read the applications of the jurors who sought to be and were excused from jury service. Each of the sixteen applications indicates that the jurors did meet the statutory justifications for excuse and that the circuit properly excused the sixteen jurors. The regular panel of jurors was properly ex-

hausted before the judge ordered the sheriff to summon the special panel. In any event, the statute "(is) merely directory and not mandatory" and appellant must "show that he has been prejudiced or that his interests have been adversely affected by failure to strictly observe these statutory provisions" in alleging error on the part of the circuit judge. State v. Thompson, 472 S.W.2d 351, 353-54 (Mo.1971). Appellant has not shown that the circuit judge failed to comply with the statute, let alone that such failure resulted in prejudice or adversely affected his interests.

B

(11) Appellant next contends that the selection of the special jury of twenty-five additional jurors by the sheriff gave the state an unfair advantage and violated his constitutional right to a fair trial on the

ground that the sheriff has an interest in attaining convictions and will choose jurors who are likely to convict. Appellant cites State v. Langley, 342 Mo. 447, 116 S.W.2d 38 (1938), a case addressing the question whether a deputy sheriff is disqualified from serving as a juror when the sheriff is a witness for the prosecution. The language cited by appellant discusses whether the deputy sheriff can be impartial as a juror:

"A deputy sheriff, under the circumstances, cannot be said to be impartial. It is obvious that he might be interested in a conviction because of the additional fees and prison board the sheriff might thereby collect. He might be interested because his own salary might, if so agreed, depend upon the number of convictions, as is often the case, in certain counties. His loyalty to his chief and fellow depu-

ties would certainly have its weight. The likelihood exists that he had become conversant with the facts in the case, and was more or less convinced as to the guilt of defendant . . ." 116 S.W.2d at 38, citing State v. Golubski 45 SW.2d 873 (Mo.App.1932) Langley did not consider the question presented in the case at bar, whether a sheriff's selection of special jurors on a circuit judge's order, after the number of jurors available from the regular panel proved inadequate, violated appellant's right to a fair trial.

None of the factors which the Langley court found to make the deputy sheriff partial apply to the facts of the case at bar. Appellant was arrested in Pemiscot County, where the murder occurred. The trial took place in New Madrid County. The sheriff in New Madrid County had not been engaged

in the investigation or arrests in the case and had no apparent interest in convicting appellant. Since the sheriff and his deputies were not involved in this case prior to trial, there was no question of the sheriff acting out of loyalty to deputies or on the basis of special knowledge of the facts of the case.

Appellant also cites the court to Ross v. Wyrick, 581 F.2d 172 (8th Cir. 1978), as authority for his contention that the selection of jurors by the sheriff deprived him of his right to a fair trial. In Ross, the Eighth Circuit held that the disparity in representation of black persons on jury panels sufficient to sustain a prima facie case of jury discrimination was not overcome by the sheriff's selection of additional black jurors. Ross addressed the issue of an exclusion of an identifiable segment of

the community. In the case at bar, appellant does not assert jury discrimination for lack of any racial,religious, age or gender group on the panel, nor alleges that the sheriff actually discriminated in the selection of jurors.

Appellant merely asserts the opportunity for discrimination deprived him of a fair trial without showing jury discrimination or prejudice in the selection of the jury. On the record, we cannot conclude that appellant was denied a fair trial because the sheriff selected the special jurors.

C

(12) Appellant's third ground for challenging the jury panel alleges that the sheriff failed to take the oath required by § 494.070, RSMo 1978, to summon an impartial jury. At the hearing on appellant's

motion to quash the jury panel, the circuit clerk testified that he did not administer the oath to the sheriff before the sheriff summoned the special jurors. In State v. Riddle, 179 Mo. 287, 78 S.W. 606 (1904), the court addressed this issue:

"It is not claimed that the sheriff or any of his deputies were guilty of any partiality or improper conduct in summoning the jury, and, as the statutes with respect to impaneling juries in criminal cases are directory, merely, even if they are disregarded that will not be the ground for a new trial, in the absence of circumstances from which it can be inferred that some prejudice resulted to defendant by reason thereof."

78 S.W. at 607. Since Riddle, this court

has continuously held that failure to observe these provisions strictly does not provide a ground for a new trial absent a showing of accompanying prejudice. State v. Thompson, supra, at 353-54. In the case at bar there is no claim that the sheriff or any of his deputies were guilty of any partiality or improper conduct. Appellant has not shown that he was prejudiced by the failure of the clerk to administer the oath to the sheriff before the selection of the special jurors. Appellant's claim of reversible error in the selection and impaneling of the jury is overruled.

V

(13) Appellant next contends that jury instruction No. 6, MAI-CR 6.06 submitting second degree murder, failed to submit the

essential element that Roger Dale Jackson did, in fact, shoot and kill Patricia Joye Holt at the direction of appellant. The first element of instruction No. 6, which is fully set out in the first part of this opinion, reads:

"First, that on the 23rd day of November, 1976, in the County of Pemiscot and State of Missouri, the defendant caused the death of Patricia Joy Holt by offering to pay one Roger Dale Jackson One Thousand Dollars ($1000.00) to kill Patricia Joye Holt and by providing Roger Dale Jackson with a handgun, . . ."

Appellant claims that this alleged omission constitutes reversible error.

The MAI-CR 6.06 form directs that this element of the instruction be presented as follows:

"First, that (on) (on or about)_____ in the (City) (County) of_____, State of Missouri, the defendant caused the death of (name of victim) by (insert such words as shooting, stabbing, cutting, striking, without further description) him, . . ." The question presented, then, is whether the words "offering to pay one Roger Dale Jackson One Thousand Dollars ($1000.00) to kill Patricia Joye Holt and by providing Roger Dale Jackson with a handgun" were properly inserted as "such words as shooting , stabbing, cutting, striking, without further description . . ." called for by the MAI-CR 6.06 instruction form. We hold that this instruction, given the facts and evidence of the case, was proper.

During the tiral the judge read the following stipulation to the jury: "The State of Missouri and the Defendant have

agreed to stipulate and do hereby stipulate and agree that the cause of death of Patricia Joye Holt was the result of gunshot wounds." "It is a well-settled general rule of law that facts which are stipulated during the course of a trial are to be taken by the jury as conclusively proven." Jackson v. United States 330 F.2d 679, 681 (8th Cir.) cert. denied 379 U.S. 885, 85 S.Ct. 105,13 L.Ed2d 58 (1964); see also State v. Jones, 549 S.W.2d 925 (MoApp.1977). Accordingly, the fact that Mrs. Holt died of gunshot wounds was already conclusively proven and it was not necessary to submit this fact to the jury. The only fact remaining for the jury was whether Roger Dale Jackson was the person who killed Patricia Joye Holt, a fact not disputed at the trial. The fact the jury

necessarily found against appellant as the jury convicted him of second degree murder for offering to pay Jackson and providing him with the handgun to kill Mrs. Holt. Appellant's contention to the contrary is overruled.

VI

Appellant contends that the trial court erred in allowing the prosecutor to cross-examine appellant pertaining to matters disclosed during conversations with Wanda Sue McAllister over a wiretapped telephone after appellant had been bound over for trial and while represented by counsel. Appellant claims that the telephone conversations constituted interrogation in the absence of counsel and were obtained in violation of both the right to counsel guaranteed by the sixth amendment and the Federal

Communications Act,47 U.S.C §§ 605 (1976).

Wanda Sue McAllister cooperated with the police and prosecutor from the day after themurder until shortly before trial. The prosecutor had told her that if she told him everything and cooperated fully, she would not be prosecuted. She agreed to testify against appellant and informed him of this fact. McAllister reported to the prosecutor all conversations she had with appellant.

McAllister, as noted above, testified against appellant at the preliminary hearing. Appellant continued to call McAllister on the telephone and he continue to see her. After the preliminary hearing, several officers visited McAllister at the request of the prosecutor and asked her permission to place a wiretap on a telephone at her grandparents' home, where she lived. She agreed. Her grandparents were aware of the wiretap and did not object to it. Severaltapes were

made of the conversations with appellant; all but one of these were unintelligible. McAllister continued to tell the prosecutor the substance of her conversations each time appellant called her. The officers again visited McAllister and placed the wiretap device on a different telephone. Shortly thereafter, a clear tape of appellant's conversation with McAllister was made.

Prior to trial, appellant's motion to supress the tape was overruled. The tape, however, was not introduced into evidence or played for the jury at the trial. We have examined the transcript of the tape from the hearing on appellant's motion to suppress. It is not clear whether any information on the tape was used by the prosecutor in cross-examining appellant nor is it clear whether the prosecutor learned

anything more than the information he had already learned from his previous interviews with McAllister. The thirty-seven page transcript of the telephone conversation reveals a rambling conversation with appellant doing most of the talking. McAllister does not ask appellant questions which would lead to incriminating statements. The two do discuss the fact that McAllister will testify at the trial against appellant and that the exposure of their ongoing relationship would reflect adversely on appellant at trial.

A

(14) Appellant contends that McAllister's conversation with him over the wiretapped telephone represented an interrogation in the absence of counsel in violation of the sixth amendment, citing Massiah v. United

States,377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and State v. Witt, 422 S.W.2d 304 (Mo.1967). In Massiah, the Supreme Court held that the petitioner's sixth amendment guarantee was violated when "federal agents had deliberately elicited (incriminating statements) from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206,84 S.Ct. at 1203. Just recently, the Supreme Court reaffirmed the holding of Massiah in Brewer v. Williams, 430 U.S. 387, 401, 97 S.Ct. 1232, 1240, 51 L.Ed.2d 424 (1977): "(T)he clear rule of Massiah is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." It is clear under Massiah and

Williams that before a defendant's rights under the sixth amendment are violated there must be an interrogation by or at the direction of government agents.

(15) In the case at bar, it was appellant who called McAllister. He knew that she had already testified against him at the preliminary hearing. He knew that she was still cooperating with the prosecution and that she had agreed to testify against him at trial. Appellant called her knowing that the prosecutor, fearful that appellant would convince McAllister to refuse to testify at trial, was upset with the fact that McAllister was still seeing appellant. As noted above, the transcript of the telephone call does not indicate that McAllister surreptitiously elicited incriminating statements from

appellant. Appellant cannot complain on the sole ground that McAllister permitted the state to intercept the telephone conversation.[4] We conclude that there was no interrogation in the absence of counsel by or at the direction of a government agent in this case. Appellant's reliance on the federal cases, Massiah and Williams, and on the Missouri cases, State v. Witt, 422 S.W.2d 304 (Mo.1967), State v. Peters, 545 S.W.2d 414 (Mo.App. 1976), is misplaced.

4. "one party to a telephone communication has no right to force the other to secrecy and, in fact, takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation . . . (citations omitted)" Coates v. United States, 307 F.Supp. 677,679 (E.D.Mo.1970).

B

(16) Appellant also contends that the telephone wiretap violated the Federal Communications Act,47 U.S.C §§ 605 (1976), which prohibits the recording of telephone conversations without the consent of one of the parties to the conversation, on the ground that McAllister was seventeen years old and thus incapable of giving legal consent. Appellant cites United States v. Napier, 451F.2d552 (5th Cir.1971), as authority for this proposition. In Napier, the consenting party to the telephone conversation, a former mental patient, had been found mentally incompetent to testify as a witness at trial but the trial court permitted the prosecution to admit into evidence telephone conversations that the mental incompetent had recorded. The Fifth Circuit vacated the conviction of the

defendant and remanded the case to the trial court for an evidentiary hearing on the capacity of the mental incompetent to consent to the wiretap. There being no suggestion in the record of the instant case that McAllister is mentally incompetent, the Napier case is inapplicable to the disposition of this question.

The Federal Communications Act does not provide that persons under the age of majority are incapable of consenting to the interception of telephone conversations, nor are we aware of any cases so holding. McAllister was seventeen years old when she consented to the wiretap. During the hearing on the motion to suppress, the judge was able to ascertain McAllister's maturity and capacity to consent, as McAllister was extensively cross-

examined by appellant's counsel at the hearing. Additionally, McAllister's grandparents, whose telephone was actually wiretapped, knew of and did not object to the wiretap. There is no evidence that the judge abused his discretion in overruling appellant's motion to suppress. Appellant's contention is overruled.

VII

(17) Appellant contends that the court erred in overruling his motion to be discharged by reason of double jeopardy arising from his being tried a second time after the court declared a mistrial and discharged the jury in his first trial before the jury had adequate and reasonable time to consider its verdict. Appellant's first

trial took place at Poplar Bluff in Butler County on February 20, 1978. By agreement the parties have provided a supplemental transcript setting forth the proceedings between the time the jury retired to consider its verdict and the time it was discharged by the trial court.

The court held a night session and the jury retired to consider its verdict at 11:15 P.M. At 12:35 A.M. the jury returned and in response to the court's question as to whether they had a verdict or were back for some other reason the foreman replied, "We have a hung jury." The Court then asked that the foreman state the numerical division without saying which way the vote was, to which the foreman replied "Nine guilty_," whereupon the court cut him off and repeated that he wanted

a numerical division. The foreman said it was "Nine and three". In response to questions from the court, the foreman said the jury had been that way for the last hour and a half and that they had "gained one and lost one"in the last little bit. The court then inquired if the foreman felt "there is any possibility of reaching a verdict" to which the foreman answered: "No, sir, I sure don't. I don't think there is any chance." The court: "You have given up on that?" Answer: "Yes sir." The then interrogated the remaining jurors, one at a time. Each one said he or she did not think there was any chance of a verdict, or words to that effect, and in response to the court's final question: "Does anybody on this jury think there is any possibility at all?", the foreman

replied: "I sure don't." Whereupon, the court acted as follows: "Let the record show that the jury reported back in at 12:35 a.m. on Tuesday, the 21st of February, 1978, and after questioning each juror, the court declares this a mistrial and the jury is discharged and the cause is passed for a setting in the next term of court . . ."

The record shows no objection, comment, or remark by either counsel for the state or counsel for appellant. The appellant takes the position that the action of the court was too hasty and done when there was no "manifest necessity" to terminate the trial; that the jury was not given an ample time to consider its verdict and that the appellant's right to "conclude his confrontation with society through the verdict of

a tribunal he might believe to be favorably disposed to his fate," United States v. Jorn, 400 U.S. 470, 486, 91 S.Ct. 547,558, 27 L.Ed.2d 543 (1971), was terminated by the trial judge in an abuse of discretion and that double jeopardy bars the present prosecution.

The state relies on Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L. Ed.2d 717 (1978), contending that the action of the trial judge in declaring a mistrial was within his broad discretion in deciding whether or not "manifest necessity" justified the discharge of the jury.

Thanks to the foreman's blunder, the trialjudge found himself in a difficult situation. Knowing that the jury was nine to three against the appellant, for the court to return them for further deliberation would be a clear signal that the judge

who knew how they stood, thought they were on the right track. It would inevitable make appellant's three jurors doubtful and apprehensive about continuing to hold out. The appellant could, with justification, contend that sending the jury back at 12:45 or 1:00 o'clock in the morning, when the judge knew they were nine to three for conviction, was a tactic to give the state more leverage to convict the appellant. It would be different if the judge knew only that the jury stood nine to three, because then his attempt to bring about a verdict by requiring further deliberation would be made without the court's knowing which side would likely be the beneficiary of his action. Under the circumstances before him, the only way the court could avoid showing favoritism to the state was to declare a mistrial. His action was not

over hasty or rash.

We note, too, that the impropriety here came from what the juror said, not from overreaching by the court or the prosecutor. The action taken by the court did not, in all probability, cost appellant a favorable outcome from the jury_the chance to "end the dispute then and there with an acquittal" United States v. Jorn, supra, 400 U.S. at484, 91 S.Ct. at 557. On the contrary, the action of the court, this being a capital case carrying a life sentence without possibility of probation or parole for 50 years was more in the interest of the appellant than against it.

(18) The state would have us rule the point against appellant on the ground appellant's counsel did not object to the

mistrial. We do not believe it would be fair to make this disposition, which would have compelled counsel to take a desperate chance. The foreman's disclosure that the jury stood nine to three in favor of guilty left counsel, through no fault of his own, where if he objected to a mistrial and were sustained, the likely outcome of further deliberation would be a verdict adverse to his client. Failure to object under these circumstances was not a waiver of double jeopardy.

Even so, however, we are convinced that the circumstances under which the mistrial was declared in the first trial showed a manifest necessity to do so, than an impartialverdict could not be reached after what took place, that the trial judge acted within his sound discretion

in declaring a mistrial, and that appellant is not being put in double jeopardy by his second trial. We therefore overrule appellant's contention on this point.

VIII

Appellant alleges several points of error in the trial court's admitting the testimony of Roger Dale Jackson, who appellant contends was mentally incompetent to testify. Appellant also alleges error in the court's overruling of his motion for judgment of acquittal on the ground that the evidence supporting the conviction without the testimony of Jackson was insufficient as a matter of law.

Roger Dale Jackson entered a plea of guilty of second degree murder for killing Patricia Joye Holt and was sentenced to twenty-five years in the penitentiary in

in return for his promise to testify against appellant. He was eighteen years old at the time of the murder. Shortly after the crime, Jackson was administered an intelligence quotient ("I.Q.") test at the jail at the request of his attorney. The test result indicated that Jackson had an I.Q. of 59, which meant that he would be classified on the borderline between mentally deficient and mentally defective, assuming that the test were properly administered under appropriate conditions. Persons with an I.Q. under 78 are normally classified as mentally retarded and persons with an I.Q. of 59 are given an approximate mental age of eight years old.

Before the trial, appellant challenged the testimonial qualifications of Jackson.

When Jackson was called to testify, appellant's counsel was permitted extensive voir dire to determine the competency of Jackson. At this time appellant introduced the transcript of testimony of a Mr. Vernon Till, given at the first trial, wherein Till gave an account of his giving the I.Q. test to Jackson in December 1976, shortly after the crime. Till was later called as a witness to testify in greater detail as to the results of the test. The trial judge examined Till extensively. The state offered rebuttal evidence about three different I.Q. tests administered by a Mr. Larry Milligan to Jackson several months prior to trial, when Jackson was twenty years old. On the basis of these three tests, Milligan found that Jackson had a composite I.Q. of 81.

The trial court questioned Jackson carefully. Jackson assured him that he understood the truth and would testify truthfully. The court overruled appellant's objection to Jackson's testimonial competency upon a finding "that the witness is able to observe, recollect and relate things which he has seen and is not a person of unsound mind."

A

Appellant contends that since Jackson allegedly had a mental age of eight years old, Jackson was presumptively incompetent under § 491.060, RSMo 1978, which provides that a child under the age of ten is presumptively incompetent to testify. Appellant cites State v. Dayton, 535 S.W.2d 479 (Mo.App.1976), as authority for this point. (19,20) Section 491.060(2), RSMo 1978, the statutory provision pertaining to wit-

nesses under the age of ten, does not apply to an adult who allegedly has a mental age under the age of ten. McCrary v. Ogden, 267 SW.2d 670, 673 (Mo.1954). State v. Dayton, cited by appellant, applies the Statute in considering the competency of a child under the age of ten andhas no application to the facts of this case. When presented with an objection to the competency of an adult who allegedly has a mental age under ten years old, a court must consider all available evidence, including mental age, to determine whether a witness is of sound mind at the time he is produced to testify. McCrary, 267,S.W.2d at 673.

(21) In the case at bar, the trial court had ample opportunity to observe and question Jackson and the expert witnesses testifying as to his intelligence. Mr. Till,

the witness who testified that Jackson's mental age was under ten, conceded that the jail, where the test was administered, was not a conducive atmosphere for maximum performance on the test and, in any event, Jackson had an incentive to do poorly on the test that his counsel had requested. Moreover, the state's expert, Mr. Milligan, contradicted Till and concluded that Jackson was not mentally retarded. After questioning Jackson the court found him of sound mine and competent to testify. The two experts testified before the jury and thereby alerted the jury to the issue of Jackson's credibility. We have studied the transcript and we conclude that the trial judge did not abuse his discretion in ruling Jackson was competent to testify.

B

Appellant also objects to Jackson's

testimony on the ground that testimony obtained by a reduction of charges and punishment presents the witness with a powerful incentive to fabricate, citing State v. Brooks, 513 S.W.2d 168 (Mo.App 1973). Appellant misreads the Brooks case. In Brooks, the conviction was reversed not because the testimony of a witness was obtained by a reduction of charges and punishment, but because the prosecution suppressed this information and led the defendant to believe that no promise to or agreement with the witness had been made. The court in Brooks indicates that the prosecution should have disclosed the agreement made; it did not hold that the agreement made the witness' testimony inadmissible.

(22,23) It has long been the rule that when a witness is given lesser punishment

for agreeing to testify, "such fact does not disqualify him as a witness, but may be shown as affecting the credibility of his evidence." State v. Woods, 346 Mo. 538, 142 S.W.2d 87,90 (1940). In the instant case, the jury was informed of the circumstances of the prosecutor's acceptance of Jackson's plea and sentence in return for his testimony. The issue of Jackson's credibility was properly brought to the jury's attention.

C

Appellant also asserts that Jackson's testimony was contradictory and inconsistent with three written statements he made prior to trial and was insufficient as a matter of law to sustain a finding that appellant was guilty beyond a reasonable doubt, citing State v. Dayton, supra. We

have already notes that Dayton deals with the testimonial competency of a child under the age of ten and has no application to this case.

(24,25) In State v. Brager, 497 S.W.2d 181, 182 (Mo.1973), this court held that a witness' credibility in view of discrepancies in his testimony is a matter for resolution by the jury. The credibility and weight of the testimony are for the jury to determine. State v. Dodson, 490 S.W.2d 92, 95 (Mo.1973). A jury may believe all, some, or none of a witness' testimony in light of the facts, circumstances and other testimony of the case. State v. Wynn, 391 S.W.2d 245,247 (Mo. 1965). In the case at bar, Jackson's contradictory statements were fully disclosed to the jury. The jury was entitled to ac-

cept part of his testimony and reject other parts, given the evidence and other testimony supporting his account of appellant's involvement in the murder. Accordingly, the credibility and weight to be afforded to Jackson's testimony were properly given to the jury for resolution.

D

(26) Appellant also contends that Jackson's testimony was incompetent as the uncorroborated testimony of an accomplice, citing State v. Shelton, 223 Mo. 118,122 S.W. 732 (1909). Appellant misreads the Shelton case, as it supports the state's position. In Shelton, the court stated that "it is also accepted doctrine that the evidence of an accomplice, even though uncorroborated, is sufficient to sustain a conviction if believed by the jury." 122S.W. at 738. Since Shelton, this court

has "held many times that a defendant may be convicted on the uncorroborated testimony of an accomplice." State v. Lang, 515 S.W.2d 507, 509 (Mo.1974). In any event, almost all of Jackson's testimony was corroborated by the evidence and through the testimony of his wife, Margaret Jackson, and his cousin Wanda Sue McAllister.

E

(27) Finally, appellant alleges that no rational trier of fact could believe that Jackson's testimony provided proof beyond a reasonable doubt of appellant's guilt citing Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed2d 560 (1979). Appellant's conviction was supported by the testimony of Wanda Sue McAllister, Margaret Jackson, Roger Dale Jackson, the Pemiscot County Sheriff, and other evidence

found at the murder scene. Viewing the evidence in the light most favorable to the prosecution, no matter what standard of appellate review is applied, the evidence of guilt is strong and convincing. The trial court did not err in overruling appellant's motion for judgment of acquittal. It is not necessary, and we make no effort in this case, to determine whether the Jackson standard applies to a direct review by this court of a conviction.

IX

Appellant next contends that the trial court erred in permitting the state to cross-examine him concerning specific acts of misconduct and intimate details of his relationship with Wanda Sue McAllister. Appellant contends that the prosecutor cross-examined him concerning his

affair with McAllister in order to prejudice the jury against him.

Prior to appellant's testimony, counsel for appellant made a motion in limine to restrict the prosecutor from going into the details of appellant's sexual relationship with McAllister. The court instructed the prosecutor not to go into the "sordid details of the relationship" nor to "try to inflame the jury in any way." An examination of the record indicates that the court exercised sound discretion and kept the prosecutor within the bounds of relevancy and materiality.

Specifically, appellant's objections include the following questions:[5] "Were you in love with Wanda McAllister?" (to which appellant replied that he loved his wife and did not love McAllister); "On

November the 20th, 1976, three days before your wife was murdered, did you take Wanda to the Hickory House Motel in Dexter?" (to which appellant replied that he did not remember); "Do you remember the last time before your wife was murdered when you went out with her?" (appellant's counsel objected to this question and appellant did not answer it); "Mr. Holt, did you go with Wanda McAllister to a motel on Saturday before your wife was murdered?"

5. The trial judge sustained appellant's objections to a question concerning presents appellant allegedly gave Wanda Sue McAllister and a question cocerning appellant's desire to have children during his marriage. Appellant also complains that the prosecutor used information from appellant's telephone conversations with McAllister as a basis for his cross-examination; we have already addressed this issue above in Part VI of this opinion.

(to which appellant replied that he did); "Did you give Wanda McAllister an engagement ring?"; (to which appellant replied that he had given her a dinner ring); and, "Were you having an affair with anyone other than Wanda McAllister?" (to which appellant replied that he was not).

Appellant claims that it was reversible error for the court to permit the prosecutor to ask these questions, under State v. Todd, 468 S.W.2d 632 (Mo.1971) and State v. Newman, 568 S.W.2d 276 (Mo. App.1978). In Todd, it was held to be reversible error for the trial court to permit cross-examination relating to prior arrests of the defendant; in Newman, the prohibited cross-examination related to details of prior crimes, the length of time the defendant had served in prison

and defendant's breach of parole. These cases involved matters not at all relevant to the crime charged and highly prejudicial to the defendant, unlike the case at bar where the matters were relevant to appellant's motive in hiring Jackson to kill Mrs. Holt.

(28,29) Wide latitude is generally allowed in the development of evidence of motive. State v. Hermann, 283 S.W.2d 617,621 (Mo.1955). In the case at bar, appellant sought to establish that Jackson, without any inducement from appellant, killed Mrs. Holt because she had refused to extend credit to him after he failed to pay his grocery bill. Appellant also testified that he loved his wife and did not love McAllister. It was necessary for the state to show appellant's motive through his love af-

fair with McAllister and his promise to marry her. The questions asked by the prosecutor sought to establish appellant's serious relationship with McAllister as a motive for wanting his wife killed. The prosecutor did not ask specific questions concerning appellant's sexual relations with McAllister other than whether he had taken her to a motel. The prosecutor's questions were properly focused so as not to be inflammatory. We hold that the evidence of appellant's relationship with McAllister was relevant and material to show appellant's motive.

(30) "Being otherwise competent, relevant and material, the fact that testimony might also tend to discredit defendant's character and that defendant had not put his character in issue would not

be a valid ground for excluding the testimony." State v. Lorts, 269 S.W.2d 88, 92 (Mo.1954). It is well-settled that evidence which is competent for one purpose cannot be excluded merely because it is incompetent and prejudicial for another purpose. State v. Gregory, 339 Mo. 133, 96 S.W.2d 47, 56 (1936); State vs. Calmese, 541 S.W.2d 349, 351 (Mo. App.1976). The trial court did not err in permitting the prosecutor to question appellant concerning appellant's relationship with Wanda Sue McAllister, as the prosecutor avoided going into inflammatory matters relating to appellant's specific sexual activity with her.

X

(31) Appellant's final point of error alleges that the trial court committed reversible error when it failed to read the

last paragraph to instruction No. 4. Appellant raises this point for the first time on appeal,having failed to object at trial when the instruction was given or when he filed his motion for a new trial.[6] Accordingly, there is nothing pertaining to this instruction for appellate review and we consider the question under the plain error rule, Rule 27.20[7]

6. Rule 20.03 provides in part that: "(S)pecific objections to given or refused instructions . . . shall be required in motions for new trial unless made on the record at the time of trial."

7. Rule 27.20(c) provides: "Plain errors affecting substantion rights may be considered on motion for new trial or on appeal, in the discretion of the court, though not raised in the trial court or preserved for review, or defectively raised or preserved, when the court deems that manifest injustice or miscarriage of justice has resulted therefrom."

State v. Cook, 491 S.W.2d 324,325 (Mo 1973).

The trial court read instruction No. 4, MAI-CR 2.20, to the jury as follows:

"The fact that the defendant has been charged with an offense is not evidence, and it creates no inference that any offense was committed or that the defendant is guilty.

"The defendant is presumed to be innocent unless and until, during your deliberations upon your verdict, you find him guilty.

"If the evidence in this case leaves in your mind a reasonable doubt as to the defendant's guilt, you must return a verdict of "Not Guilty".

The court omitted to read the last paragraph of the instruction which reads:

"This presumption of innocence places upon the state the burden of proving beyond a reasonable doubt that the defendant is guilty".

Appellant claims this omission left the jury without any instruction on the fundamental principle that the state has the burden of proof beyond a reasonable doubt. The record refutes appellant's claim.

(32,33) The court read instructions Nos. 5 through 7 to the jury.[8] Each of these instructions included the following paragraph:

8. Instruction No. 5 MAI-CR 6.02 is the approved instruction for first degree murder; No. 6, MAI-CR 6.06, is the approved instruction for second degree murder; and, No. 7, MAI-CR 6.08 is the approved instruction for manslaughter.

"However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing then you must find the defendant not guilty . . ." (emphasis added).

Instructions must be considered together State v. Vainikos, 366 S.W.2d 423, 425 (Mo. banc 1963). Reading instruction No. 4 with instructions Nos. 5 through 7, it is obvious that the jury was instructed as to the burden on the state to prove each element of the offense beyond a reasonable doubt. The jury convicted appellant of second degree murder on the basis of instruction No. 6, which, as noted above, contained a paragraph instructing the jury as to the state's burden of proof. Moreover, appellant's counsel read MAI-CR 2.20 in its entirety to the jury and explained the paragraph, which

the trial court had inadvertently omitted, without noting the court's omission.

On the basis of this record, we cannot say that the trial court's omission of the last paragraph of instruction No. 4, MAI-CR 2.20, constituted "manifest injustice" or a "miscarriage of justice" under Rule 27.20(c), and we find no plain error in this regard.

The judgment of the trial court affirmed.

All concur.

Opposition

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CLERK

No. 81-532

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EUGENE HOLT,
Petitioner,

v.

DONALD WYRICK, WARDEN,
MISSOURI STATE PENITENTIARY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the petitioner's due process right to a fair trial was violated because, pursuant to state statute, the sheriff chose bystander venireman, when the sheriff was not the chief law enforcement officer in the county in which the crime took place, neither the sheriff or his subordinates investigated the case or testified against the petitioner and there was no showing that the bystanders were chosen in a manner calculated to bring about conviction.

II.

Whether the petitioner's conviction for murder second degree was based upon evidence with which a rational trier of fact could find the petitioner guilty beyond a reasonable doubt, when, according to Missouri statutes as interpreted by the Missouri Supreme Court, murder second degree is a lesser included offense of capital murder, the crime originally charged against the petitioner.

III.

Whether the use of a witness' preliminary hearing transcript at trial violated petitioner's Sixth Amendment right to confrontation and cross-examination when the witness was unavailable, the testimony was from a prior judicial hearing, the testimony was given under oath and the petitioner had an adequate opportunity to cross-examine the witness.

IV.

Whether the petitioner's Sixth Amendment right to counsel was violated when a recording device was placed on the telephone of his paramour's grandparents, petitioner voluntarily telephoned his paramour who recorded the con-

versations, the information was not used in the prosecution's case in chief and the information was only used in an attempt to impeach the petitioner.

V.

Whether the petitioner's conviction, upon retrial, violated the double jeopardy clause because, in the first trial, the trial court granted a mistrial after one hour and twenty minutes of deliberation when: The jurors announced that they were hopelessly deadlocked; the jury foreman mistakenly announced that they stood nine guilty to three not guilty; and where the petitioner, by his failure to object, acquiesced in the granting of the mistrial.

LIST OF PARTIES

In the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit, the parties were: Eugene Holt, petitioner-appellant; and Donald W. Wyrick, Warden, Missouri State Penitentiary, respondent-appellee.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, affirming the denial of the petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, is reported at 649 F.2d 543.

The opinion of the United States District Court for the Eastern District was not reported, and appears at page 50 of the Appendix to the petition for a writ of certiorari.

The opinion of the Missouri Supreme Court (from which certiorari is not presently sought) is reported at 592 S.W.2d 759.

JURISDICTION

This Court has jurisdiction of this proceeding pursuant to 28 U.S.C. § 1254(1), since it is an appeal from a decision of the Court of Appeals denying the petitioner, a state prisoner, a petition for a writ of habeas corpus.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution.

2. The Sixth Amendment to the United States Constitution.

3. The Fourteenth Amendment to the United States Constitution.

4. Section 494.250 RSMo.

5. Section 559.005 RSMo Supp. 1975 (Repealed 1977).

6. Section 559.020 RSMo 1969 (Repealed 1977).

The above provisions appear in Respondent's Appendix A.

STATEMENT OF FACTS

The petitioner, upon retrial, was convicted of murder second degree in the Circuit Court of New Madrid County, Missouri. Pursuant to an application for a change of venue filed by the petitioner, a change of venue was granted from Pemiscot County, where the crime took place, to New Madrid County. The petitioner's first trial ended in a mistrial. In that first trial, the foreman of the jury announced that they were deadlocked after one hour and twenty minutes of deliberation. The trial court then asked for the

numerical division, specifically requesting that he not be told the vote. In spite of the trial court's direction, the foreman announced that the jury stood nine guilty. The petitioner's counsel did not object to the declaration of a mistrial at that point, and a mistrial was declared by the trial court.

Prior to the retrial of the petitioner, the petitioner filed a motion stating that he was being placed in double jeopardy by being tried again. The petitioner also filed a motion to quash the jury panel, alleging that they had not been ordered and summoned by law, that there had been no exhaustion of the regular panel prior to the special veniremen's being chosen by the sheriff, and that the method of selection by the sheriff violated the Sixth and Fourteen Amendments to the United States Constitution. The petitioner's Motion to Quash the Jury Panel was sustained on the ground that nine alternate jurors had not been excused, and the cause was passed until next term. Prior to trial, the petitioner again raised the same motions to dismiss for double jeopardy grounds and the motion to quash the special jury panel. A hearing on the petitioner's motion to quash the jury panel was held in which the circuit clerk of New Madrid County, testified that, of the regular panel which was summoned, the sheriff was not able to find twelve, and the Circuit Judge had excused sixteen panel members. That left twenty-two regular panel members and there was an order requesting twenty-five special veniremen. The clerk also testified that he did not know the manner in which the sheriff chose any veniremen and that the orders excusing the jurors were for various reasons, *i.e.*, health, college, or occupation. There were no other witnesses called in the hearing, and the petitioner's motion to quash the jury panel was overruled.

During voir dire, the petitioner's attorney declined to

interrogate the veniremen individually. All six of the petitioner's challenges to veniremen for cause were sustained, and the State was given eight peremptory challenges while the petitioner was given sixteen.

A hearing was held on a motion to discover if Wanda Sue McAllister would testify for the state. Ms. McAllister, *in camera,* took the Fifth Amendment to questions from both the petitioner's attorney and the prosecuting attorney. Ms. McAllister had testified at the preliminary hearing.

Prior to trial, the petitioner had also filed a motion to suppress any statements made by the petitioner to Wanda McAllister, on the ground that said statements violated his Sixth Amendment right to counsel. At this motion to suppress hearing, Ms. McAllister was first called to testify. She testified that she had been interviewed by law enforcement officers and had testified at the preliminary hearing. She testified that Mr. Hazel, the prosecutor, told her that if she told the truth and cooperated, she would not be prosecuted. She testified that she had seen the petitioner four or five times after the preliminary hearing on dates, and that she had reported several phone calls from the petitioner to the prosecuting attorney. Following these reports, Trooper Joe Moore came to Ms. McAllister's grandparents' house, where she was living, with a tape recorder. Ms. McAllister was told that she was to let the police know if the petitioner called, but she was advised by the prosecutor not to go out with or see the defendant. According to Ms. McAllister, Officer Moore told her that she was required to record conversations when the petitioner called her. The recorder was hooked to her grandparents' phone, and, according to Ms. McAllister, she was told that the prosecution wanted enough evidence to convict the petitioner. The petitioner did not

know of the recordings which were made. It was stipulated by both parties at the motion to suppress that it was the petitioner who called Wanda when these conversations were recorded.

Officer Joe Moore, a highway patrolman, testified that he attached a recorder to the telephone at Ms. McAllister's grandparents' home. The recordings took place after the preliminary hearing and that neither the petitioner nor his attorney were told of the tape recording plans. Ms. McAllister had been getting phone calls where the caller had been hanging up, and, according to Mr. Moore, the recorder was attached to see if the petitioner was still calling her. Mr. Moore told Wanda that, when the defendant called, if she could, she should get him to talk about the case. Ms. McAllister said that she would get the prosecuting attorney a tape recording. According to Mr. Moore, Wanda was the one who desired to do it and never complained about the recordings. The grandparents, on whose phone the tape recorder was placed, did not object. In fact, they asked if the tapes were any good. Further, the prosecuting attorney never told Ms. McAllister that he was her lawyer or that he would represent her interests. The Motion to Suppress was overruled.

At trial, the first witness called by the prosecution was the sheriff of Pemiscot County. The sheriff opened the door of the petitioner's home, and found the body of petitioner's wife. The sheriff then went to see the petitioner at the church parsonage. The petitioner told the sheriff that he had been at a ballgame. The petitioner later, when asked, reported that a gun was missing. The parties stipulated that Mrs. Holt's death was caused by gunshot wounds.

Margaret Jackson testified that Wanda McAllister had been dating the petitioner and that petitioner had

previously talked about electrocuting his wife. Roger, her husband, had no gun with him when he left the house on November 23, 1976, but returned home three hours later with a pistol. Margaret stated that she was told that if she testified, she would not be prosecuted. On cross-examination, it was brought out that Roger Jackson stated that he was going to kill Mrs. Holt when he left his house and that Mrs. Holt had previously cut off the Jacksons' credit at the grocery store.

Roger Jackson was called to the stand and was voir dired by petitioner's counsel outside of the presence of the jury. According to this testimony, it was indicated that Roger was twenty years old and had completed the seventh grade. He stated that being sworn as a witness meant to tell the truth, that he knew what perjury was, and that people should tell the truth so that "we have justice". The court then examined Mr. Jackson. He stated that he understood the oath and intended to tell the truth. He also stated that he could recall events of two years before and relate them, and that he had never been declared incompetent. The court then overruled the petitioner's objection that Roger Jackson was incompetent as a witness and allowed him to testify.

Mr. Jackson's testimony indicated that he and Wanda McAllister were cousins who had been raised together by the grandparents. The petitioner asked Roger if he wanted to make $1,000 for killing the petitioner's wife so that the petitioner could marry Wanda McAllister. According to Mr. Jackson, they had two conversations concerning killing Mrs. Holt. The petitioner told Jackson that he was to shoot her in the back and set fire to the house. According to Mr. Jackson, the petitioner showed him, at the house, how to use the gun. The petitioner gave Mr. Jackson gloves and told him to go in the back door. The petitioner showed him

where a can of charcoal lighter was located. Jackson was to use this charcoal lighter with the gas heater to burn the Holt house after he had shot Mrs. Holt. The petitioner told Jackson that Mrs. Holt would be coming in the front door and that Jackson was to wait in the spare bedroom. The petitioner told Jackson that he was going to Neeley for a basketball game so that he would be seen by lots of people. While Jackson was alone in the house, he called Wanda McAllister. According to Roger Jackson's testimony, upon being recalled to the stand Wanda told him not to miss. Roger testified that, when Mrs. Holt came in, he shot her in the back and ran out the back door to his house. Subsequent to the killing, Jackson admitted that he had written letters to his wife saying that Wanda had killed Mrs. Holt and had written letters to friends saying that he had not killed her. Jackson admitted that he had lied when he wrote those letters which indicated that he and the petitioner had not committed the murder.

Roger Jackson had pled guilty to murder second degree and was sentenced to twenty-five years imprisonment for his part in the killing and also was convicted of escape for which he was sentenced to two years. Upon being recalled, Mr. Jackson testified that he would not have shot Mrs. Holt had Wanda not told him to do it when he had called her from the victim's house.

It was stipulated at trial that Wanda McAllister, if called, would invoke her Fifth Amendment privilege rather than testify. After testimony, the court found that the witness was unavailable because she had exercised her Fifth Amendment privilege and allowed her preliminary hearing testimony to be read into evidence. The prosecuting attorney was admonished not to tell the jury why Ms. McAllister was not testifying, and the official court reporter stated that Wanda McAllister was under oath at the

preliminary hearing and that it was an accurate transcript of the preliminary hearing. The petitioner objected on the ground that the witness had not signed the hearing, as required by state law, and that use of the preliminary hearing testimony violated the petitioner's rights under the confrontation clause. The petitioner's objections were overruled, and Ms. McAllister's testimony, via the preliminary hearing transcript, was as follows:

Wanda McAllister testified that she was the petitioner's lover. The petitioner had previously talked to her about attempting to drown and electrocute his wife. Ms. McAllister also testified that the petitioner had told her that he was going to shoot Mrs. Holt, but the gun had misfired. Ms. McAllister testified that the petitioner had stated he was going to hire someone to kill Mrs. Holt and that Roger Jackson had stated that the petitioner had offered him money to kill Mrs. Holt. According to Ms. McAllister, the petitioner stated that he was ninety-nine percent sure Roger did everything like he had planned and that Roger wouldn't get caught. According to Ms. McAllister, she and the petitioner talked about Roger's killing Mrs. Holt many times and that the petitioner had given Roger a key to his house. On Tuesday, the petitioner called Ms. McAllister and stated that "tonight is the night". The petitioner stated that he would have a good alibi. She also testified that the petitioner had tried to get her to change her testimony.

On cross-examination, it was brought out that Ms. McAllister had never been married and had a child fathered by one Jackie Collins. It was also brought out that she had never notified the authorities, even though she knew that this murder plan was in effect. The petitioner's counsel also attempted to get Ms. McAllister to admit, on cross-examination, that she was the one who wanted Mrs. Holt

dead (Exhibit A, page 213). It was also brought out, on cross-examination, that Roger Jackson had been mad at Mrs. Holt, that Ms. McAllister loved Roger and wanted to protect him, and that she had repeated to Roger how he was to kill Mrs. Holt. She stated that Roger Jackson is "slow" and that she had stopped him from killing Mrs. Holt twice before but had a change of heart because the petitioner had told her that his wife was going to have him killed. It was also brought out, on cross-examination, that Ms. McAllister was under the opinion that she had been granted immunity for her testimony.

At this point, the State rested. The statements of the petitioner made to Ms. McAllister which were recorded on the telephone and which had been the subject of the Motion to Suppress were not introduced in the State's case in chief.

The defense called Vernon Twill a high school counselor, who testified that he had administered an IQ test to Roger Jackson while Mr. Jackson was in the Pemiscot County Jail. Mr. Twill stated that Roger had a mental base age of 8, a mental quotient of 59, and had bad recall. According to Mr. Twill, a quotient of 78 or lower signifies mental retardation. Mr. Twill also testified that the conditions under which a person takes the test makes a difference and that IQ tests cannot tell you if a person is lying. The defense also read into evidence the letters from Roger Jackson, referred to by Mr. Jackson during his examination.

The petitioner took the stand and testified that he had cut off Roger's credit two to three weeks prior to the murder. It had been his wife who told Mr. Jackson that his credit was being eliminated. The petitioner, under questioning by his attorney, admitted that he had had an affair with Ms. McAllister, denied ever discussing killing

his wife, denied offering Roger Jackson $1000 to kill his wife, and stated that he had nothing to do with his wife's death. On cross-examination, it was brought out that he was infatuated with Wanda and that he had a $10,000 insurance policy on his wife. Under questioning by the prosecuting attorney regarding the admissions he had made on the tape, the petitioner denied ever having made those admissions.

The state's rebuttal testimony came from Larry Milligan who was a guidance counselor with the State Department of Mental Health. He gave Roger Jackson a battery of intelligence tests and came to the conclusion that Roger was a slow learner and a low achiever, but that he was not subnormal in intelligence.

The jury was instructed on capital murder, murder second degree and manslaughter. The jury returned a verdict of guilty of murder in the second degree and recommended that the petitioner be sentenced to life imprisonment.

REASONS FOR DENYING THE WRIT

I.

Whether the petitioner's due process right to a fair trial was violated because, pursuant to state statute, the sheriff chose bystander venireman, when the sheriff was not the chief law enforcement officer in the county in which the crime took place, neither the sheriff or his subordinates investigated the case or testified against the petitioner and there was no showing that the bystanders were chosen in a manner calculated to bring about conviction.

The petitioner alleges that his conviction is violative of the Due Process Clause because bystander veniremen were chosen by the Sheriff of New Madrid County, pursuant to § 494.250 (2) RSMo 1978. (The statute appears in Respondent's Appendix A). The respondent disagrees.

It is clear that the petitioner had no right to a particular jury which is itself a cross-section of the community. *Taylor* v. *Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 702, 42 L.Ed.2d 690 (1975). A claim of the denial of due process in jury selection requires a prima facie showing by the petitioner that the group alleged to be excluded is a distinctive group in the community, that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community and that the underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren* v. *State of Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). The respondent contends that no such showing was made in the case at bar.

In his petition, the petitioner argues in essence that any jury panel on which members were chosen by the sheriff pursuant to § 494.250 (2) RSMo 1978, is inherently

violative of the Due Process Clause and that no further showing need be made.

In support of his contention, the petitioner relies on *Henson* v. *Wyrick*, 634 F.2d 1080 (8th Cir. 1980), *cert. denied* 489 U.S. L.W. 3619 (February 24, 1981). In that case, the Eighth Circuit had the opportunity to hold § 494.250(2) RSMo 1978 unconstitutional on the ground that having a sheriff choose bystander veniremen is inherently prejudicial. However, that court refused to do so. Rather, the court held that under the combined facts as found in that case—the sheriff who chose the jury was also the sheriff of the county in which the crime had been committed; two of the sheriff's subordinates actively investigated the case, made the arrest and testified during the prosecution's case; and the sheriff exercised his discretion to ensure that only his acquaintances would fill venire panel vacancies—there was ample showing of potential prejudice of a conviction-prone jury. According to the Eighth Circuit in *Henson*, due to the combination of the above-mentioned facts, the sheriff's acquaintances on the jury could easily associate the credibility of the sheriff with the investigation and the testimony of the subordinates.

In the instant case, the sheriff who chose the bystanders was the Sheriff of New Madrid County, where the trial had been transferred on a change of venue. Thus, the Sheriff who testified at trial and investigated the case (the Sheriff of Pemiscot County) was not the sheriff who chose the bystanders. Further, there was no showing that the Sheriff of New Madrid County chose the bystanders in a non-random manner. Had the bystanders been chosen in an improper manner, the petitioner could have called the sheriff to testify as to his method of choosing at the pre-trial hearing on his motion to quash the jury panel. However, the petitioner chose not to call the sheriff, rely-

ing on his claim that the statutory procedure is unconstitutional on its face.

The respondent contends that the mere fact that a sheriff or marshall chooses the bystander veniremen is not a ground for vacating the conviction without a showing of interest on the part of the sheriff or marshall that would tend to produce a jury biased in favor of conviction. *Cravens* v. *United States*, 62 F.2d 261 (8th Cir. 1933), *cert. denied* 289 U.S. 733 (1933); *Humes* v. *Robbins*, 128 F.Supp. 586 (E.D. Maine 1955). Thus, the respondent contends that, under the facts of this case, there has been no showing of inherent prejudice in an uninterested sheriff choosing bystander veniremen and that, contrary to the petitioner's assertion, the statutory practice should not be declared unconstitutional *per se*.

II.

Whether the petitioner's conviction for murder second degree was based upon evidence with which a rational trier of fact could find the petitioner guilty beyond a reasonable doubt. When, according to Missouri statutes as interpreted by the Missouri Supreme Court, murder second degree is a lesser included offense of capital murder, the crime originally charged against the petitioner.

The petitioner claims that his conviction is violative of the Due Process Clause because no rationale trier of fact could find him guilty beyond a reasonable doubt of murder second degree. The petitioner's argument is twofold: first, the evidence showed the petitioner guilty of only capital murder or not guilty at all; second, the petitioner claims that the testimony of Roger Jackson was inherently unbelievable.

As to the petitioner's first argument, the respondent contends that under the Missouri statutes, as interpreted

by the Missouri Supreme Court, second degree murder is a lesser included office of capital murder (or conventional first degree murder), and an instruction on second degree murder (as well as manslaughter) is, and was at the time of the petitioner's trial, required in every case in which the jury is instructed on capital murder. *State* v. *Stapleton*, 518 S.W.2d 292 (Mo. banc 1975); *State* v. *King*, 577 S.W.2d 621 (Mo. banc 1979). The Missouri Supreme Court has interpreted these two homicide statutes in a manner requiring submission of the lesser degree of homicide, recognizing the jury's right to not find one of the mental elements of capital murder, and yet still find that the petitioner intended and did kill (or aided in the killing of) the deceased and, therefore, was guilty of murder second degree. Under the Missouri Supreme Court's interpretation, it is not possible to absolutely require a jury to find that the facts, if believed, could only form the requisite intent for capital murder. According to the Missouri Supreme Court the jury can always disbelieve that a defendant had the requisite mental intent for capital murder and yet did intend and kill (or aid in the killing of) the deceased. This, under § 559.020, RSMo 1969 (repealed 1977) would be second degree murder.

In *State* v. *King*, *supra*, the Missouri Supreme Court ruled that it was reversible error not to instruct upon the offenses of murder second degree and manslaughter since the jury, under the Missouri Supreme Court's interpretation of its homicide statutes, had the right to find that the defendant did not have the requisite state of mind for conventional first degree murder and yet did have the state of mind required for murder second degree or manslaughter. In other words, while the petitioner contends that there is not evidence which would, in his mind, require the jury to acquit him of capital murder and find him guilty of murder second degree, the Missouri Supreme

Court has stated that whenever there is a submissible case of capital murder, there is also a submissible case of murder second degree and manslaughter and the jury need not point to certain evidence which would tend to acquit the defendant of the greater in order to convict him of the lesser.

The respondent contends that the Eighth Circuit was correct in its holding that the federal courts, on a petition for a writ of habeas corpus, should not reach this issue since it rested on the state court's interpretation of its own statutes. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 129, 65 S.Ct. 1475, 1480, 89 L.Ed.2d 2092 (1945). See also *Hallowell* v. *Keve*, 555 F.2d 103, 107 (3rd Cir. 1977), where the defendant claimed that Delaware had misinterpreted its manslaughter statute, thus depriving the defendant of an instruction on involuntary manslaughter. The Third Circuit held that only where the state court's interpretation was an obvious subterfuge to evade consideration of a federal issue would a federal court, on a writ of habeas corpus, reexamine that interpretation.

Similarly, Missouri's interpretation has been consistent, though often opposed by the prosecution (*State* v. *Stapleton, supra,* and *State* v. *King, supra*) and is not an obvious subterfuge to evade consideration of a federal issue. Thus, the respondent contends that this Court, in a habeas corpus proceeding, should defer to Missouri's interpretation of its own statute.

As to the petitioner's claim that under *Jackson* v. *Virginia*, 433 U.S. 307, 324, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979), there was not sufficient evidence from which a rational trier of fact could find the petitioner guilty of second degree murder, the respondent would contend that there was ample evidence present. Under the standard established in *Jackson* v. *Virginia, supra,* it is presumed

that the trier of fact has resolved any conflicts in favor of the prosecution. In the case at bar, there is ample evidence that the petitioner hired Roger Jackson to kill the victim. Jackson testified that the petitioner offered him money to kill the victim and provided him with a gun. There is also evidence from Jackson, his wife, and Wanda McAllister of expressions by the petitioner that he intended to kill his wife. McAllister testified that the petitioner told her how Jackson was to kill the victim. There was no showing that the petitioner took any actions in anger, fear or agitation suddenly provoked by the unexpected acts on conduct of the victim. In order to find the petitioner guilty of murder second degree, the jury needed to have found that the petitioner caused the death of the deceased by offering Jackson money to kill her and by providing Jackson with the hand gun, that the petitioner intended to take the life of the deceased and that petitioner did not do so in anger, fear or agitation suddenly provoked by an unexpected act or conduct of the victim. Finally, the jury could have found that the defendant acted either alone or knowingly and with common purpose together with one or more others in order to commit the acts which resulted in the death of Patricia Holt. Thus, there was more than ample evidence that the petitioner did all of the required elements of second degree murder. Further, as the lower courts pointed out, given the somewhat limited mentality of the assassin, the petitioner could not have been practically certain to cause the death of the deceased, as would be required in capital murder.

Thus, it is the respondent's contention that a rational trier of fact could have found the defendant guilty beyond a reasonable doubt of murder second degree and that there was ample evidence in this case of that crime, as the statute has been interpreted by the Missouri Supreme Court. The petitioner argues, in essence, that the evidence

showed only capital murder. The petitioner did not object to the submission of murder second degree at trial. The respondent contends that the petitioner cannot now complain of being convicted of the lesser when he did not object to the instruction, and the evidence was sufficient not only to convict of murder second degree but was probably also sufficient to show the greater offense, capital murder.

The petitioner would ask this court to reweigh the evidence and find that the testimony of Roger Jackson, the assassin, was not credible. As noted previously, *Jackson* v. *Virginia* does not allow the federal court, upon a petition for a writ of habeas corpus, to review the credibility of the witnesses. See *Edwards* v. *Sasser*, 462 F.Supp. 374, 376 (E.D. Va. 1979). Further, while the petitioner points out evidence of Roger Jackson's low I.Q., it should be noted that the State, in rebuttal, offered testimony of a guidance counselor for the State Department of Mental Health who testified that, according to the tests he gave Roger Jackson, Jackson was not subnormal in intelligence. The fact that Roger Jackson was an admitted liar was not a fact to consider concerning the admissibility of his testimony but, rather a fact for the jury to consider in deciding upon his credibility. Thus, the petitioner is, in essence, asking this Court to weigh the evidence and come to a conclusion different from that of the trier of the fact.

The respondent contends that the petitioner has not carried his burden of showing that no rational trier of fact could have the petitioner guilty beyond a reasonable doubt based upon the testimony of Roger Jackson, the Sheriff of Pemiscot County, Wanda McAllister and Margaret Jackson. In fact, there is nothing about the testimony presented by the State which would make it so unbelievable that twelve jurors were all acting irrationally in giving the testimony credibility.

III.

Whether the use of a witness' preliminary hearing transcript at trial violated petitioner's Sixth Amendment right to confrontation and cross-examination when the witness was unavailable, the testimony was from a prior judicial hearing, the testimony was given under oath and the petitioner had an adequate opportunity to cross-examine the witness.

The petitioner claims that the introduction at trial of the perliminary hearing testimony of Wanda McAllister violated his Sixth Amendment right to cross-examination and confrontation. The respondent disagrees.

At trial, Ms. McAllister exercised her Fifth Amendment privilege against self-incrimination and refused to testify. The trial judge ruled she was unavailable after she refused, during two *in camera* examinations, to answer questions. She stated that she would persist in exercising her Fifth Amendment privilege to the point of going to jail for contempt. Thereafter, the preliminary hearing testimony of Ms. McAllister was read to the jury. The respondent contends that the lower courts were correct in their determination that the testimony was admissible because Ms. McAllister was unavailable at trial, the prior testimony was given at a previous judicial proceeding against the petitioner and the petitioner had an adequate opportunity to cross-examine Ms. McAllister.

The introduction of an unavailable witness's prior testimony does not necessarily violate the confrontation clause if the witness is unavailable and there has been previous opportunity for cross-examination. *Mattox* v. *United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). The witness must be unavailable and the prior testimony must have a sufficient indicia of reliability such that the trier of fact has a satisfactory basis for

evaluating the truth of the prior statement. *Ohio* v. *Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

In the case at bar, the respondents contend that Ms. McAllister was unavailable. She had been subpoenaed by the State and was present at court. However, she indicated, out of the presence of the jury, her intention to invoke her Fifth Amendment privilege against self-incrimination. She indicated that, under pain of going to jail, she would refuse to answer questions in front of the jury. The court then found that, based upon her Fifth Amendment claim, she was unavailable at trial. The respondent contends that clearly a witness who invokes the Fifth Amendment is unavailable at trial. *California* v. *Green*, 399 U.S. 149, 167-168, 90 S.Ct. 1930, 1940 26 L.Ed.2d 489 (1970); *Phillips* v. *Wyrick*, 558 F.2d 489 (8th Cir. 1977).

Thus, it being established that the witness was unavailable and that the prosecution had made good faith efforts to produce her, the issue then becomes whether there is an indicia of reliability about her prior testimony. The respondent contends that there was such an indicia in the case at bar since the testimony was given under oath, in front of a judicial tribunal and the petitioner was afforded not only an adequate opportunity to cross-examine, but actually cross-examined the witness, both as to her ability to recall and as to her credibility, in detail.

Thus, as in *Ohio* v. *Roberts, supra*, the preliminary hearing transcript of a witness, who was unavailable at trial, was introduced. The respondent contends that under the tests of *California* v. *Green, supra* and *Ohio* v. *Roberts, supra*, the preliminary hearing transcript had an indicia reliability and thus there is no reason to grant certiorari on this ground.

The petitioner cites to the court *Douglas* v. *Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), and al-

leges that the Eighth Circuit's decision is in contradiction to that case. However, in *Douglas* v. *Alabama*, the issue was not admission of prior testimony. There, the case was reversed based upon the fact that by calling the co-defendant, knowing he would take his Fifth Amendment privilege, solely to question him regarding his out of court confession violated the right to cross-examination regarding that confession. However, in the case at bar, as in *Ohio* v. *Roberts, supra*, there was an adequate opportunity to cross-examine at the time the statement was made, unlike in *Douglas* v. *Alabama*. Further, it should be noted that *Douglas* v. *Alabama*, predates *Ohio* v. *Roberts*, and *California* v. *Green*, and the case at bar involves the issues covered in those latter two cases rather than the issue of a previous out of court statement for which there was no opportunity to cross-examine the speaker.

IV.

Whether the petitioner's Sixth Amendment right to counsel was violated when a recording device was placed on the telephone of his paramour's grandparents, petitioner voluntarily telephoned his paramour who recorded the conversations, the information was not used in the prosecution's case in chief and the information was only used in an attempt to impeach the petitioner.

The petitioner claims that this Court should grant certiorari because the Eighth Circuit held that the tape recordings of conversations between the petitioner and his paramour violated the Sixth Amendment, but that the error was deemed harmless beyond a reasonable doubt. The respondent contends that the Eighth Circuit only assumed, for the purposes of the argument, that if there was error it was harmless. The respondent contends that there was no Sixth Amendment violation. Alternatively, if there was a Sixth Amendment violation, there was no error in

the case at bar because the information was not used during the State's case in chief, and was used only for impeachment. Finally, if there was error, the respondent contends that the Eighth Circuit was correct in its holding that any error was harmless beyond a reasonable doubt under the facts of this case.

The Court of Appeals, at 649 F.2d at 550, stated, only, "*Assuming* that the prosecutor interfered with Holt's right to counsel, we deem the error harmless beyond a reasonable doubt." (emphasis added). Thus, the Court of Appeals did not reach the question of whether the tapes were actually made and the information used in violation of the petitioner's constitutional right to counsel, but only stated that if there was error it was harmless beyond a reasonable doubt. The respondent contends that there was no violation of the petitioner's Sixth Amendment rights.

The petitioner and Wanda McAllister became lovers around January, 1976. The petitioner admitted at trial that he was infatuated with Wanda McAllister. After the murder for which the petitioner was convicted had occurred, he continued to see Wanda McAllister and speak with her over the telephone, which was located in Ms. McAllister's grandparent's home. The prosecutor had told Ms. McAllister that if she told him the truth she would not be prosecuted. Ms. McAllister testified that she was told by the prosecutor to let him know if the petitioner called her. After the preliminary, the law enforcement officers visited Wanda McAllister to see if she would agree to have a tap placed on her grandparent's phone and she agreed to do so. Ms. McAllister was told specifically not to call the petitioner. Only one tape made as a result of this tap was intelligible. The statement was not introduced into evidence nor played for the jury at trial. It is also clear that Ms. McAllister had discussed all conversations she

had had with the petitioner with the prosecutor prior to the tap being placed on the phone. Ms. McAllister was not paid as a government informant. Since the tape recordings were not used at trial, the question which exists is whether the petitioner's Sixth Amendment right to counsel was violated by Wanda McAllister's telling the prosecutor the substance of her conversations with the petitioner.

There is no *per se* violation of the Sixth Amendment right to counsel because the petitioner had counsel at the time he made the telephone calls to Wanda McAllister. *United States* v. *Massey*, 437 F.Supp. 843 (M.D. Fla. 1977). If a defendant is interrogated, subsequent to being represented by counsel in absence of counsel and the evidence is used in the case in chief at trial, there is a violation of the Sixth Amendment. *Massiah* v. *United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); *Brewer* v. *Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). The recent case heavily relied upon in the lower courts by the petitioner was *United States* v. *Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). In *Henry*, a paid informant, previously unknown to the defendant, was placed as the defendant's cellmate while he was in custody. During the relationship between these two men, the defendant made certain admissions to the informant concerning the crime. The informant was called as a witness in the government's case in chief and testified about the admissions made to him by *Henry*. This Court, in reversing, held that in an interrogation had taken place based upon four principle factors. Those factors were that the witness was a paid informant, the witness was a former stranger placed in the cell block near the petitioner in a manner which would obviously lead the petitioner to believe that he was nothing more than cellmate, the petitioner was in custody at the time and the evidence was used in the government's case in chief in order to convict Henry.

The respondent contends in the case at bar the facts are not as compelling as those in *Henry*. Ms. McAllister was not a paid government informant. She was not a former stranger, placed by the government, in a position in which to gain information. Rather, she was the petitioner's lover, doing nothing but sitting at home. She indicated to the prosecution that it was the petitioner who was calling her and instigating these conversations. In *Henry*, the informant was placed in a situation where it was entirely likely the defendant would initiate these conversations. The respondent contends that placing a paid informant in a jail cell with the defendant's is much more likely to initiate conversation than to have an individual sit at home by her telephone with a tap on it. In *Henry*, the placing of the informant near him was likely to induce the conversation. In the case at bar, there was no inducement by the State for the petitioner to call Wanda McAllister. This was a voluntary telephone conversation from the petitioner to his paramour, the woman for whom he has killed his wife. Thus, the first three facts which were labeled as important in *Henry* are not in existence in the case at bar. Further, the fourth fact, the introduction of this evidence in the case at chief, is also missing from this case. The tape was not introduced into evidence at all in the trial. The information from this tape, which the prosecution could have gotten either from the tape or from talking with Ms. McAllister, was used only to attempt to impeach the petitioner. Further, following the petitioner's denial that these statements were made, the matter was dropped. Thus, the respondent contends that there was no interrogation in the case at bar.

Further, the petitioner does not allege that the statements, made by the petitioner to Ms. McAllister following a voluntary telephone call, were in any way non trustworthy under a totality of the circumstances test. The pe-

titioner was obviously not coerced, and does not claim to have been coerced, into calling Ms. McAllister of his own volition. The petitioner's allegations are not that the petitioner did not make these statements, or that these statements were coerced so that they were not trustworthy. Rather, his allegations are that because he was represented by counsel when he made the phone call, the tapes were made in violation of the Sixth Amendment. The respondent contends that since there is absolutely no allegation or proof that the statements were untrustworthy due to coerciveness, they were proper impeachment material. While the exclusionary rule may keep a statement or item of evidence out of the government's case in chief, it is clear that the exclusionary rule is not a license for the defendant to commit perjury in taking the stand. *United States* v. *Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980); *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); *Oregon* v. *Haas*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed. 570 (1975). The petitioner took the stand, knowing that these tapes or their information had not been introduced in the case in chief. When he denied any part in the murder of his wife, the State was entitled to impeach him by use of prior inculpatory statements which he had made.

Finally, should this Court agree with the petitioner, or indulge in the Eighth Circuit's assumption, that the tapes were seized in violation of the Sixth Amendment, the respondent contends that the Eighth Circuit was correct in holding that any error would have been harmless beyond a reasonable doubt. As noted by the Eighth Circuit, the testimony of Roger Jackson, the preliminary hearing testimony of Wanda McAllister and the testimony of Margaret Jackson was substantial evidence of the guilt of the petitioner. Further, as noted by the Eighth Circuit, much of the cross-examination, which appeared in 649 F.2d at 549-

50, footnote 7, related to the petitioner's relationship with Wanda McAllister, a relationship which he had conceded had existed. The Eighth Circuit, after reviewing the entire record, concluded that the information derived from these tape recordings, under the standard of *Chapman* v. *California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), was harmless error in light of the substantial evidence presented during the state's case in chief against the petitioner and the fact that the petitioner admitted to his relationship with Ms. McAllister.

V.

Whether the petitioner's conviction, upon retrial, violated the double jeopardy clause, because, in the first trial, the trial court granted a mistrial after one hour and twenty minutes of deliberation when: The jurors announced that they were hopelessly deadlocked; the jury foreman mistakenly announced that they stood nine guilty to three not guilty; and where the petitioner, by his failure to object, acquiesced in the granting of the mistrial.

The petitioner claims that his conviction was in violation of the Double Jeopardy Clause of the Fifth and Fourteenth Amendments because the trial court, in the petitioners' first trial, erred in declaring the mistrial based upon a deadlocked jury because the jury had not deliberated long enough. The respondent contends that the trial court did not abuse its discretion in dismissing the jury, and the petitioner, by failing to object acquiesce in such dismissal and thus this Court should not grant certiorari.

It is well established that there is no double jeopardy violation if a defendant is retried after a jury has been properly dismissed as deadlocked. *Wade* v. *Hunter,* 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949). Further, if the defendant asks or acquiesces in the granting of a mistrial, there is no double jeopardy violation upon retrial.

United States v. *Dinitz,* 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). If a defendant does not object to the discharge of a deadlocked jury, then he has waived any double jeopardy claim upon retrial. *United States* v. *Phillips,* 431 F.2d 949 (3rd Cir. 1970); *United States* v. *Beckerman,* 516 F.2d 905 (2nd Cir. 1976); see also *United States* v. *Castellanos,* 478 F.2d 749 (2nd Cir. 1973).

In the case at bar, the jury foreman related to the judge, after having deliberated for one hour and twenty minutes, that they could not reach a verdict. The judge then asked for the numerical division of the jurors, specifically requesting that the foreman not tell him how many jurors were voting guilty or not guilty. The foreman then, contrary to specific direction, responded that nine jurors were in favor of finding the petitioner guilty. The foreman stated that they had been divided that way for almost the entire time they had deliberated, and each and every juror indicated that they did not think a verdict could be reached. It was at this point that the court declared a mistrial and discharged the jury, a ruling to which the petitioner did not object. Indeed, after the trial judge discovered, through voluntary statements by the foreman contrary to the court's direction, that the jury was nine to three in favor of guilt, the respondent contends that it would have been to the defendant's disadvantage, and perhaps coercive of the jury, to send them back and order them to deliberate further. Thus, respondent contends that the Eighth Circuit was correct in stating that, under the facts of this case, there was manifest necessity for the declaration of the mistrial since courts have often recognized that forced deliberation, in circumstances such as the petitioner's, may lead to badgering of the jurors and forced verdicts. See *United States ex rel Blades* v. *Beldock,* 459 F.Supp. 985 (E.D. New York 1978).

Further, as noted above, the respondent contends that

because the petitioner made no objection to the discharge of the first jury and was aware of the fact that it was nine to three in favor of guilty, it may be presumed that he acquiesced in the discharge and cannot now raise a claim of double jeopardy upon retrial.

CONCLUSION

For the reasons outlined in the previous section of this response, the respondent respectfully urges this Court to deny the petitioner's request for a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

Amendment V, United States Constitution

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, United States Constitution

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers,

counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 494.250 RSMo 1978

Clerk to draw names—sheriff to summon jury, when.— **1.** The clerk of the board of jury commissioners, so situated as to be unable to see the names on the slips, shall proceed publicly, in the presence of the board of jury commissioners, to draw out names separately and singly from one township until he gets the number of names required from such township for petit jurors and an equal number as alternate jurors to serve on petit juries if summoned. In the same manner he shall continue to draw names from each of the remaining townships, separately and singly, until he has drawn the names of twenty-four persons who shall serve as petit jurors at the next ensuing term of court for which petit jurors are drawn, and the names of twenty-four persons to be designated as alternate petit jurors, the names of said alternate petit jurors to be recorded and numbered consecutively from one to twenty-four, inclusive, in the order in which they are drawn.

2. In all cases where the board of jury commissioners fails to select jurors and alternates, as required by law, the sheriff of the county shall summon petit jurors from the several townships in the county, according to their respective populations, as nearly as may be, not less than ten days before the first day of the term of the court for which the jurors are summoned; and the sheriff when ordered by the court demanding a jury shall summon petit jurors during the term from the bystanders, after the list of alternate petit jurors has been exhausted. No person shall be summoned as a standing juror twice within the period of one year in any court of record.

Section 559.020 RSMo 1969 (Repealed 1977)

Murder in the second degree.—All other kinds of murder at common law, not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree.

Section 559.005 RSMo Supp. 1975 (Repealed 1977)

Capital murder defined.—A person is guilty of capital murder if he unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of a human being.

Petitioner's Reply Brief

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NO. 81-532

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EUGENE HOLT,
PETITIONER,

VS.

DONALD WYRICK, WARDEN,
MISSOURI STATE PENITENTIARY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Pursuant to Rule 22.5, this reply brief will be limited to the arguments first raised in Respondent's Brief under the Questions Presented I, dealing with the constitutionality of a sheriff hand picking jurors in a State criminal trial, and a subsequent decision of the 8th Circuit on this issue, Thompson vs. White (8th Cir., October 14, 1981), 661 F.2d 103, decided after this Petition for Certiorari was filed.

In Thompson, supra, the 8th Circuit held that it was a denial of due process for a Missouri Sheriff to select the panel of jurors, although the crime occurred in another county and the sheriff nor his

deputies investigated the crime. The Court in Thompson, supra, attempts to distinguish its decision in this case; Holt vs. Wyrick (CA 8th, May 14, 1981), 649 F.2d 543, on two grounds; (1) the victim was a law enforcement officer and the sheriff would feel sympathy for his family, and (2) the sheriff selected the whole panel and in Holt, the sheriff only selected a majority of the jury panel (25 of a panel of 45).

In Holt, supra, the 8th Circuit attempted to distinguish its earlier decision in Henson vs. Wyrick (8th Cir. 1980) 635 F.2d 1081, on the ground that the sheriff's office of the adjoining county of Pemiscot rather than the sheriff's office of the county of the trial, New Madrid County, conducted the investigation and there was no evidence the sheriff selected only his acquaintances for the jury. Both of these

assertions are without basis of fact in the record. The record is completely silent on both issues and Petitioner's Motion to Remand the case for an evidentiary hearing on these questions as the 8th Circuit did in Henson vs. Wyrick, supra, in an order filed February 29, 1980, was denied in Holt. Pemiscot County and New Madrid County, Missouri, are in rural out-state Missouri and as in most areas of the country, there is close cooperation between their respective offices. However, Petitioner was denied the right to have an evidentiary hearing on the facts which the 8th Circuit determined against Petitioner without an evidentiary basis.

Even assuming the factual validity of the reasons the 8th Circuit distinguished Holt, supra, from Henson, supra, such reasons are too thin a foundation on which to ground an exception to the

fundamental due process right of a fair and impartial jury. Obviously, the 8th Circuit is concerned with the fundamental fairness of Missouri's method of selecting by-stander jurors by the sheriff, the chief law enforcement officer of the county. Of the three cases from the 8th Circuit dealing with this issue, Henson, supra, Holt, supra, and Thompson, supra, the 8th Circuit has found denial of due process in two of the cases and allowed it to stand only in Holt. Under the rulings of the 8th Circuit, Missouri's practice of allowing the sheriff to hand-pick the jury is unconstitutional, if the sheriff's deputies investigated the crime (Henson, supra); if the sheriff and his deputies did not investigate the crime but if the victim was a law enforcement officer and the sheriff selected the whole panel (Thompson, supra). However, if the victim was not a law enforcement officer

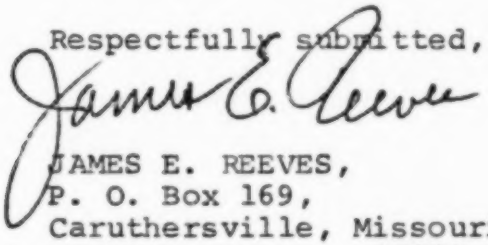
and the sheriff only selected a majority, 25 out of 45, it is not unconstitutional (Holt, supra). Criminal defendants in Missouri now only have a constitutional right to a jury which is not hand-picked by the sheriff only if they kill a police officer and the sheriff selects all of the jurors. The attempts by the 8th Circuit to distinguish Holt, supra, from its earlier decision in Henson, supra, and its later decision in Thompson, supra, are without any substantial basis. The fundamental due process of right of trial by a fair and impartial jury is far too important to exist only where the sheriff has investigated the crime or the victim is a law enforcement officer and the sheriff has selected all of the panel members. Whether the sheriff selects all of the panel members or a majority as in Holt, or only one

should make no difference constitutionally. The fair and impartial selection of jurors should not be polluted by even one impartially selected juror and the identity of the victim of the crime should not determine whether the chief law enforcement officer can hand-pick a jury.

Missouri's widespread practice of allowing sheriffs to hand-pick jurors in State criminal prosecutions is not only unfair, in fact, it gives the opportunity and appearance of unfairness and for this latter reason alone should be declared unconstitutional. Public confidence in the fairness and integrity of the criminal justice system should not depend on the reputation or public perception of any individual sheriff. This practice is too fraught with opportunity for abuse to pass constitutional muster and for these reasons, this Court should grant

Certiorari and strike down Missouri's unconstitutional jury selection practice.

Respectfully submitted,



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